(5)

Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

No. 00-10666

In The

# Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Fourth Circuit**

## JOINT APPENDIX

THEODORE B. OLSON
Solicitor General
*Counsel of Record*
MICHAEL CHERTOFF
Assistant Attorney General
MARC I. OSBORNE
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
*Counsel for Respondent*

WILLIAM C. INGRAM
First Assistant Federal Public Defender
*Counsel of Record*
Suite 210
101 South Elm Street
Greensboro, North Carolina 27401
(336) 333-5455
*Counsel for Petitioner*

**Petition For Certiorari Filed June 18, 2001**
**Certiorari Granted December 10, 2001**

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

285 pp

TABLE OF CONTENTS


| | Page |
|---|---|
| Relevant Docket Entries | 1 |
| Indictment, filed 7/26/99 | 2 |
| Superseding Indictment, filed 8/31/99 | 4 |
| Transcript of Change of Plea Hearing and Bench Trial, 10/26/99 | 7 |
| Position of United States with Respect to Sentencing Factors, filed 1/12/00 | 173 |
| Defendant's Response to Government's Position Concerning Sentencing Factors, filed 2/7/00 | 198 |
| Transcript of Sentencing Hearing, 2/17/00 | 210 |
| Judgment, filed 2/28/00 | 255 |
| Notice of Appeal, filed 2/18/00 | 267 |
| *United States v. Harris*, No. 00-4154 (4th Cir. March 20, 2001) | 269 |

## RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
for the
MIDDLE DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| 7/26/99 | 1 | INDICTMENT as to WILLIAM JOSEPH HARRIS (1) count(s) 1,2 (rw) [Entry date 07/26/99] |
| 8/31/99 | 8 | SUPERSEDING INDICTMENT as to WILLIAM JOSEPH HARRIS (1) count(s) 1s, 2s, 3s, 4s (gr) [Entry date 09/01/99] |
| 12/9/99 | 22 | TRANSCRIPT OF CHANGE OF PLEA HEARING and BENCH TRIAL held before JUDGE WILLIAM L. OSTEEN, SR. in GSO filed in case as to WILLIAM JOSEPH HARRIS for dated of 10/26/99. Court Reporter Mary Jo Beck. (161 pgs.) (kg) [Entry date 12/10/99] |
| 1/12/00 | 26 | POSITION of USA re: Sentencing Factors as to WILLIAM JOSEPH HARRIS (Sealed) (kg) [Entry date 01/12/00] |
| 2/7/00 | 27 | POSITION of WILLIAM JOSEPH HARRIS re: Sentencing Factors as to WILLIAM JOSEPH HARRIS (Sealed) (kg) [Entry date 02/08/00] |
| 2/18/00 | 29 | NOTICE OF APPEAL by WILLIAM JOSEPH HARRIS (1) count(s) 2s, 1, 2s, 2, 3s, 4s appealing judgement and sentence dated 2/17/00 (cb) [Entry date 02/22/00] [Edit date 02/22/00] |

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| | : | |
| v. | : | 1:99CR191-1 |
| WILLIAM JOSEPH HARRIS | : | (Filed Jul. 26, 1999) |

The Grand Jury charges:

COUNT ONE

On or about April 30, 1999, in the County of Stanley, in the Middle District of North Carolina, WILLIAM JOSEPH HARRIS willfully, knowingly and intentionally did unlawfully distribute approximately 114 grams (gross weight) of marijuana, a Schedule I, controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(D).

COUNT TWO

On or about April 30, 1999, in the County of Stanley, in the Middle District of North Carolina, WILLIAM JOSEPH HARRIS, during and in relation to a drug trafficking crime for which he could be prosecuted in a court of the United States, that is, distribution of marijuana, in violation of Title 21, United States Code, Section 841(a)(1), did knowingly carry a firearm, that is, a 9mm Taurus semi-automatic pistol, Model PT92F, Serial Number TKE92836AFD; in violation of Title 18, United States Code, Section 924(c)(1).



A TRUE BILL:

/s/ Joel Clifton Rosenquist
FOREPERSON

/s/ Steven H. Levin
STEVEN H. LEVIN
ASSISTANT UNITED STATES ATTORNEY

/s/ Benjamin H. White, Jr.
for WALTER C. HOLTON, JR.
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | SUPERSEDING |
| v. | : | 1:99CR191-1 |
| WILLIAM JOSEPH HARRIS | : | (Filed Aug. 31, 1999) |

The Grand Jury charges:

COUNT ONE

On or about April 30, 1999, in the County of Stanley, in the Middle District of North Carolina, WILLIAM JOSEPH HARRIS willfully, knowingly and intentionally did unlawfully distribute approximately 114 grams (gross weight) of marijuana, a Schedule I, controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(D).

COUNT TWO

On or about April 30, 1999, in the County of Stanley, in the Middle District of North Carolina, WILLIAM JOSEPH HARRIS, during and in relation to a drug trafficking crime for which he could be prosecuted in a court of the United States, that is, distribution of marijuana, in violation of Title 21, United States Code, Section 841(a)(1), did knowingly carry a firearm, that is, a 9mm Taurus semi-automatic pistol, Model PT92F, Serial Number TKE92836AFD; in violation of Title 18, United States Code, Section 924(c)(1).



COUNT THREE

On or about May 6, 1999, in the County of Stanley, in the Middle District of North Carolina, WILLIAM JOSEPH HARRIS willfully, knowingly and intentionally did unlawfully distribute approximately 100 grams (gross weight) of marijuana, a Schedule I, controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(D).

COUNT FOUR

On or about May 6, 1999, in the County of Stanley, in the Middle District of North Carolina, WILLIAM JOSEPH HARRIS, during and in relation to a drug trafficking crime for which he could be prosecuted in a court of the United States, that is, distribution of marijuana, in violation of Title 21, United States Code, Section 841(a)(1), did knowingly carry a firearm, that is, a 9mm Taurus semi-automatic pistol, Model PT92F, Serial Number TKE92836AFD; in violation of Title 18, United States Code, Section 924(c)(1).

A TRUE BILL:

/s/ Joel Clifton Rosenquist
FOREPERSON

/s/ Steven H. Levin
STEVEN H. LEVIN
ASSISTANT UNITED STATES ATTORNEY

/s/ Benjamin H. White, Jr.
for WALTER C. HOLTON, JR.
UNITED STATES ATTORNEY



IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Criminal Action No. 1:99CR191-1 |
| Plaintiff, | ) | |
| vs. | ) | Greensboro, North Carolina |
| WILLIAM JOSEPH HARRIS, | ) | October 26, 1999 10:05 a.m. |
| Defendant. | ) | (Pages 1-161) |

TRANSCRIPT OF CHANGE OF PLEA HEARING
and BENCH TRIAL

BEFORE THE HONORABLE WILLIAM L. OSTEEN, SR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

STEVEN H. LEVIN, ESQUIRE
Assistant United States Attorney
Post Office Box 1858
Greesnboro, North Carolina 27402

For the Defendant
William J. Harris:

WILLIAM C. INGRAM, ESQUIRE
Assistant United States
Public Defender
101 South Elm Street, Suite 210
Greensboro, North Carolina 27401

Court Reporter:

Mary Jo Beck, CSR, RPR, RMR
Room 101, U.S. Courthouse Building
324 West Market Street
Greensboro, North Carolina 27401

Proceedings reported by stenotype reporter.
Transcript produced by computer-aided transcription.

* * *

[2] INDEX


| WITNESS | DX | CX | RDX | RCX | COURT |
|---|---|---|---|---|---|
| WILLIAM JOSEPH HARRIS | (Change of plea hearing) | | | | 6 |
| JOSEPH ALEXANDER BOYKIN | 33 | 53 | | | |
| ROBERT EURY | 60 | 63 | | | |
| WILLIAM JOSEPH HARRIS | 67 | 86 | 102<br>107 | | 103<br>109 |
| TODD ALRIDGE CRUMP | 110 | | | | |
| ROGER HER | 113 | | | | |
| LEE JAMES McRAE | 115 | 120 | | | 121 |
| PATRICK MASSARONI | 123 | 129 | | | 129 |


EXHIBITS


| NO. | PAGE |
|---|---|
| Government's 1-3 | 37 |
| Government's 2-A | 42 |
| Government's 4 | 42 |
| Government's 5-6 | 48 |
| Government's 7 | 45 |
| Government's 8 | 87 |
| Defendant's 1 | 76 |




[3] (Court in session at 10:05 a.m.)

(Defendant present.)

THE COURT: Well, Mr. Ingram may be off the hook a little bit here. I seem to have left the file in Greensboro this morning. And I took it to Greensboro, so I know it was my fault. Nevertheless, we can proceed.

But there is no plea agreement on this, I take it, is that right?

MR. LEVIN: That's correct, Your Honor.

THE COURT: If you will let me have a copy of the indictment.

MR. LEVIN: Your Honor, I don't believe I have called the case yet.

THE COURT: You haven't yet. Give it to Mr. Howard.

All right, Mr. Levin, what are you calling this morning?

MR. LEVIN: Government calls *United States of America versus William Joseph Harris,* Case Number 1:99CR191-1.

This matter is on for a change of plea initially, followed by a trial, Your Honor.

THE COURT: All right.

Mr. Ingram, are you and your client ready to proceed?

MR. INGRAM: Yes, Your Honor, we are.

THE COURT: Mr. Ingram, you have a matter that you wish to take up before we get to the trial, that is, a change of plea on what I take is to Count 1?

[4] MR. INGRAM: That's correct, Judge. My client will enter a guilty plea this morning to Count 1, and we will proceed to trial on Count 2. And it is my understanding at some point prior to trial Mr. Levin will, in open court, move to dismiss Counts 3 and 4.

THE COURT: Mr. Ingram, have you had all of the time that you need to have with your client before coming here this morning on Count 1?

MR. INGRAM: Yes, sir, Your Honor, we have.

THE COURT: Do you believe he understands what he is charged with in Count 1?

MR. INGRAM: Yes, I do.

THE COURT: After you had done the work that you thought was necessary to do in connection with that case, did you give your client your advice as to what you thought he ought to do on Count 1?

MR. INGRAM: Yes, I did.

THE COURT: And did he seem to understand and want to accept that advice?

MR. INGRAM: Yes, he did.

THE COURT: And was the advice that he plead guilty to Count 1?

MR. INGRAM: That was my advice, yes.

THE COURT: And it is your understanding that in return for that plea of guilty to Count 1, and upon the



disposition of [5] Count 2, that the Government will not object to a dismissal of Count 3; is that correct?

MR. INGRAM: Counts 3 and 4.

THE COURT: Counts 3 and 4?

MR. INGRAM: Yes.

THE COURT: Mr. Ingram, you obviously, then, think that's in your client's best interest, is that correct?

MR. INGRAM: That's correct.

THE COURT: So far as you know, has anybody made any threats or promises to get your client to tender a plea of guilty to Count 1?

MR. INGRAM: No, Your Honor.

THE COURT: Then let me talk to Mr. Harris.

Yes, sir?

MR. LEVIN: I'm sorry to interrupt, Your Honor, but I want to make clear that the Government's motion to dismiss Counts 3 and 4 is not related in any way to the plea of guilty to Count 1. It's a separate matter entirely, and I just want to make sure.

THE COURT: Whatever is being done in Count 1 has no effect on the dismissal of Counts 3 and 4?

MR. LEVIN: Right. We intend to dismiss Counts 3 and 4, regardless of the plea entered into in Count 1.

THE COURT: All right. Do you understand, Mr. Ingram, that though it may be done at the same time that

sentencing [6] takes place, that it is not necessary that he enter a plea of guilty to Count 1 in order to have Counts 3 and 4 dismissed?

MR. INGRAM: That is my understanding. And, in fact, Your Honor, there really is no bargain here. He is not receiving anything in exchange for pleading guilty to Count 1.

THE COURT: All right, sir. Then let me talk to Mr. Harris a little while.

Mr. Harris, if you will put your left hand on the Bible and raise your right hand, please, sir.

WILLIAM JOSEPH HARRIS, DEFENDANT HEREIN, SWORN DIRECT EXAMINATION

BY THE COURT:

Q Mr. Harris, I'm sure you understand, but I must ask you anyway, do you understand that you have just taken an oath to respond truthfully to all questions put to you by the Court?

A Yes, sir.

Q Do you further understand that failure to respond truthfully could cause the Court to reject what you're wanting to do in Count 1 here today, but in addition to that, it could result in independent charges of perjury being brought against you if you intentionally tell the Court something that is not true? Do you understand that?

A Yes, sir.



Q Have you ever been hospitalized for any mental condition or drug addiction?

[7] A No, sir.

Q Are you presently under the care of a doctor?

A No, sir.

Q Are you taking any kind of prescribed medicine?

A No.

Q You are not in custody?

THE COURT: Is that correct, Mr. Ingram?

MR. INGRAM: That's correct, Judge.

BY THE COURT:

Q This will not be used to penalize you in any way, so you may answer freely, but have you within the last 24 hours consumed any kind of alcoholic beverage?

A Yeah.

Q All right. When?

A Last night.

Q And how much at that time did you consume?

A A couple Rolling Rocks.

Q A couple Rolling Rock beer, is that right?

A Yes.

Q About what time?

A. About 10:00.

Q Was there anything about the consumption of the beer that you drank about ten o'clock that in any way prevents you from hearing and understanding what the Court is saying to you today?

A No, sir.

[8] Q Have you had any kind of illegal substance in the last 24 hours?

A No, sir.

Q Mr. Harris, have you had all of the time that you wanted to have with Mr. Ingram before coming here today?

A Yes, sir.

Q Do you believe that Mr. Ingram has followed up on everything that you wanted him to follow up on before coming here?

A Yes, sir.

Q And so far as you know, has Mr. Ingram done anything that you did not want him to do before coming here?

A Not yet.

Q Pardon?

A No.

Q Now, do you understand that if you tender a plea of guilty to Count 1, you are pleading guilty to a felony, and as such you would be losing your civil rights? Of course, you lose your civil rights if you're found guilty by a jury, also.



So, the fact that you plead instead of being found guilty is not determined here. But if you plead guilty or are found guilty, you lose your civil rights, among those rights being the right to vote, the right to hold public office, the right to serve on a jury, and the right to own or to even possess a firearm. Do you understand that you would be giving up those rights?

[9] A Yes, sir.

Q Did anybody make any threats or promises to you to get you to plead guilty to Count 1?

A No, sir.

Q Let me more specifically ask you, has the Government promised you anything in order to get you to tender your plea of guilty to Count 1?

A No.

Q All right, sir.

THE COURT: Now, since I sent Mr. Howard out with the indictment, what does Count 1 charge? Is it a drug case?

MR. LEVIN: Yes, Your Honor. Specifically, that on or about April 30th, the defendant willfully, knowingly and intentionally and unlawfully distributed approximately 114 grams of marijuana, Your Honor.

THE COURT: All right.

BY THE COURT:

Q Now, Mr. Harris, if you want to have a jury trial in this case you're entitled to do that. Nobody can take that away from you. Do you understand that?

A Yes, sir.

Q And if you want a jury trial, then it would be up to the Government to prove its case beyond a reasonable doubt. And if it cannot prove its case beyond a reasonable doubt, then you would be entitled to be found not guilty. Do you understand [10] that?

A Yes, sir.

Q What the Government would have to prove beyond a reasonable doubt is that sometime on or about April the 30th, 1999, in the Middle District of North Carolina, that you knowingly and willfully and intentionally possessed for the purposes of distribution an amount, not necessarily an exact amount, but an amount of marijuana, and that at the time that you possessed it for the purposes of distribution, or at the time that you attempted to distribute it, that you knew that you possessed some kind of controlled substance.

A Yes, sir.

Q Do you understand that's what the Government would have to prove?

A Yes, sir.

Q Now, do you understand that if you want to have a jury trial that you're entitled to confront all of the witness that the Government may bring in here against you, and to have Mr. Ingram cross examine those witnesses to bring out favorable testimony to your side of the case and unfavorable testimony to the Government's side of the case? Do you understand that?

A Yes, sir, I do.



Q You are also entitled, if you're able, you're entitled to subpoena witnesses who may be helpful to you; and if you are not able to pay for the attendance of those witnesses, then you're [11] entitled to ask the Court to order that those witnesses be here, and the Court would then require that the Government pay for their attendance. Do you understand that?

A Yes, sir.

Q Do you also understand that you would have a right to testify in your own behalf, and if you wanted to exercise that right nobody could keep you off the stand? Do you understand?

A Yes, sir.

Q But you also have a right not to testify. And if you don't want to testify, then nobody could make you go on the stand to testify, and the fact that you don't testify could not be used to prove your guilt. Do you understand that?

A Yes, sir.

Q Now, Mr. Harris, if in fact the Court accepts your plea of guilty here as you're tendering, there is not going to be any jury in this case for anything, and the only thing left for the Court to do will be to determine an appropriate sentence. Do you understand that?

A Yes, I do, Your Honor.

Q Do you understand that the maximum sentence which the Court could impose upon you is no more than five years imprisonment, followed by not less than two years of supervised release, and in addition to that a fine

of no more than $250,000, restitution and forfeiture could be appropriate, and that there would be a special assessment of $100. Do you understand that's the most [12] that the Court could do?

A Yes, sir.

Q Now, has Mr. Ingram talked to you about something called Sentencing Guidelines?

A Yes, he has.

Q It may be that Mr. Ingram, because he is experienced in this field, he may have, after he did his work – I would assume he would still have to pull out a book, I certainly would – and say here is where I think you fit within Sentencing Guidelines, and here is where I think you'll be sentenced on this count with the minimum and maximum range. He may have told you that. And if he did, that's perfectly all right. Did he do that?

A Yes, he did.

Q That's fine for him to do it, but you should know right now that even Mr. Ingram may not know all of the factors that are necessary to be considered in sentencing, and no one will know all of those factors until after a presentence report is done. Only then will your ordinary Sentencing Guideline be determined. Do you understand that?

A Yes, sir.

Q Once your ordinary guideline range is determined, then for good and valid reason the Court can remove you from that guideline and put you in a more



severe sentencing category or a less severe sentencing category, if appropriate. Do you understand that?

[13] A Yes, sir.

Q Do you understand that if you get more time than you thought you were going to get, that that's no reason to let you withdraw your plea of guilty, you would be stuck with it at that time? Do you understand?

A Yes, sir.

Q Now, if you think that the Court improperly gives you too much time in this case you have a right to appeal. But if the United States Attorney's office believes that this Court has improperly given you too little time, then Mr. Levin and his office have a right to appeal to ask the Fourth Circuit to make me properly resentence you. Do you understand that?

A Yes, sir.

Q Has anybody made any threat or promise to get you to do anything that you're doing here today?

A No, sir.

Q Is there any question about what you are doing that you want to ask the Court about?

A No, sir.

Q Do you still wish me to accept your plea of guilty to Count 1?

A Yes, sir.

Q How far did you go in school, Mr. Harris?

A Eleventh grade.

Q As such, I would guess, but it is purely a guess, that you [14] probably gained enough experience to be able to read and understand the indictment for yourself, is that correct?

A Yes, sir.

Q And did Mr. Ingram go over it additionally with you to the extent that you felt comfortable that you understood exactly what you were charged with?

A Yes, he did.

Q Is there still anything you want to ask the Court about what you're doing?

A No, sir.

THE COURT: Mr. Ingram, do you have any other inquiry you wish the Court to make?

MR. INGRAM: No, Your Honor.

THE COURT: Mr. Levin?

MR. LEVIN: Your Honor, my only concern, I believe the Court indicated that the Government would have to prove possession with intent to distribute. Count 1 is actually a straight distribution.

THE COURT: It's what?

MR. LEVIN: It is a distribution charge, Your Honor. And I think the Court indicated possession with intent to distribute when discussing.

THE COURT: Okay.



MR. LEVIN: I don't think it makes any difference, but I want to point it out to the Court.

[15] BY THE COURT:

Q This is a distribution, and that would require not necessarily that you possess it, but it would require that you are part of the agreement and part of the act of distribution of the marijuana. Do you understand that?

A Yes, sir.

Q One other thing I did not say: When I gave you the maximum sentence that the Court could impose, which was five years, followed by not less than two years of supervised release, you should know also, Mr. Harris, that whatever time you may get by way of active sentence, there will be supervised release for some period of time following that. And though you may serve every day, you do understand that parole has been abolished in the federal system?

A Yes, I do.

Q And what time you get is pretty much what you serve. And whatever sentence you may get, once you serve that sentence and are on supervised release, then, and in that event, if you violate the terms of supervised release you could be subject to an additional active prison sentence for the violation of the supervised release. Do you understand that?

A Yes, sir.

Q All right, sir.

THE COURT: Anything else now, Mr. Ingram, that you have?

MR. INGRAM: No, Your Honor.

[16] THE COURT: Mr. Levin?

MR. LEVIN: No, Your Honor.

THE COURT: The Court will find, then, that Mr. Harris has willfully, knowingly and intentionally tendered his plea of guilty to the charges contained in Count 1 of the indictment, only after a full understanding of all of his rights pertaining to the defense of this matter, and that no threats or promises have been made to him in order to induce his plea. Therefore, the Court accepts the plea tentatively, only subject to a basis in fact being shown for the acceptance of the plea, which may be done during the trial of the next matter.

Is that what we're going to do?

MR. LEVIN: That's what we expect to do.

THE COURT: Is that all right with you, Mr. Ingram?

MR. INGRAM: Yes, sir.

THE COURT: All right, sir. If this is your only copy, you may have it back.

MR. LEVIN: I have an additional copy.

THE COURT: We'll proceed at this point with the trial on Count 2.

MR. LEVIN: Your Honor, at this time the Government would move to dismiss, without prejudice, Counts 3 and 4.



THE COURT: All right. Without objection on the part of Mr. Ingram and his client, Counts 3 and 4 will be dismissed.

Mr. Ingram, you have a motion to make before. Is that [17] more appropriately done now or is it after opening statements, when I get a little better feel of what we are proceeding with here?

By the way, do you have the waiver of jury trial?

MR. INGRAM: I do not have that.

THE COURT: I guess that's in the file.

MR. INGRAM: We have not signed it.

THE COURT: You have not signed?

MR. INGRAM: We only made a decision, Mr. Levin and I, then my client and I, I believe, on about midday on Thursday to do that, and we have not yet signed a waiver of jury trial.

THE COURT: Do we have those forms or does the United States Attorney's office have those forms?

THE CLERK: I have never seen one, I don't think.

THE COURT: You don't have those anymore? We used to have one.

MR. LEVIN: I didn't know our office would have it. I assumed it would be filed by the defense.

THE COURT: Let me talk to Mr. Ingram for a moment.

Mr. Ingram, after you had done all of the work that you thought was necessary for you to do, did you give your client your advice as to what to do on Count 2?

MR. INGRAM: Yes, I did, Your Honor.

THE COURT: And as I understand it now, your client wishes to continue his plea of not guilty, but he also wishes to [18] waive a jury trial in the matter, is that correct?

MR. INGRAM: That is correct.

THE COURT: Do you believe that is in your client's best interest?

MR. INGRAM: Yes, I do.

THE COURT: Let me speak to Mr. Harris.

BY THE COURT:

Q Mr. Harris, you need not be sworn again, because you're still under oath from the last time.

Mr. Harris, Mr. Ingram did give you his advice on what to do here, is that correct?

A Yes, sir.

Q And did you understand the advice that Mr. Ingram was giving to you?

A Yes, I did.

Q Did you want to accept that advice?

A Yes, I did.

Q Do you understand, in making the decision on Count 2 that you're making, that you are waiving a jury



trial of 12 people, and allowing the Court to simply be in the position of a juror in this case, to make a decision of guilty or not guilty? Do you understand that?

A Yes, sir.

Q And no one can force you to do that. If you want a jury trial in this matter, you will not be penalized for that, and [19] that's a decision that is completely voluntary, must be voluntary on your part. Do you understand that?

A Yes, I do, sir.

Q Do you also understand that if a jury gets this case, they're not entitled to make a consensus or a majority decision on guilty or not guilty, they're required to make a unanimous decision of guilt before you could be found guilty? Do you understand that?

A Yes, sir.

Q Do you understand that by doing it this way, you're leaving it in the hands of one person to make that decision?

A Yes, I do.

Q That's what you want to do?

A Yes, sir.

Q All right, sir. All right. You may have a seat, Mr. Harris.

MR. INGRAM: Your Honor, I have a copy of my motions that were filed. Since you don't have a file, if you would like me to hand that up.

THE COURT: I would.

MR. INGRAM: Your Honor, I have handed up a copy of Mr. Levin's Notice of Intent concerning some 404(b) information, and my motions in liminie [sic], and my response to that Notice of Intent.

THE COURT: Why don't you let me look at these just a moment.

[20] All right. I will again take this up at the time that there is an attempt to introduce any evidence here, Mr. Ingram, but it appears to me that on number one, motion to exclude evidence of frequency of defendant's marijuana transactions, and the quantity of marijuana involved in those transactions, I'm not sure whether there is a difference in amounts. But from your position, as I understand it, you intend to introduce evidence that he did, in fact, sell marijuana on other occasions at home, and didn't have a gun at home.

And it seems to me that that would be appropriate for the Government to show that he did have the gun on other occasions when he did sell marijuana. That seems to me to be somewhat a factual dispute, although it may be your position that as long as he was at home, he did not have a gun, therefore, that should shed some light on the fact that the gun at the pawn shop was not for the purposes of carrying during and in relation to the marijuana transaction. It seems to me like both sides of those might be relevant.

Secondly, the recorded conversations between Agent Boykin and the defendant, I'm not quite sure that I understand that, but your indication is – and number



two, that there is no reference to anything except a sale of marijuana at that point. And I could sort of understand your position on that, but then it looks to me like in number three you indicate, well, there was a discussion of some guns in there, which is very [21] prejudicial to the matter. I'm not sure I quite understood what drives that distinction.

MR. INGRAM: Your Honor, if I might respond to both of those matters.

THE COURT: Yes.

MR. INGRAM: I really think to the extent that I requested that there being no cross examination about frequency of transactions, I would withdraw that.

I'm more concerned about the quantity, because, first of all, I think it is irrelevant to the issue of whether or not he carried a firearm on any occasion when he sold marijuana, wherever he may have sold it. The key issue there is did he carry a firearm in relation to those sales.

THE COURT: Let me stop you right there. If you do try to show that he made sales of marijuana at home, and did not have a weapon present, do you intend to show the amounts, quantity of those sales?

MR. INGRAM: No, Your Honor.

THE COURT: All right. I would tend to agree then, from what you're saying, that I don't think the quantity of marijuana is necessary to bring out, but let me ask Mr. Levin.

Is that something that is relevant, Mr. Levin?

MR. LEVIN: I think it is relevant, Your Honor, to show that if it was a small stash of drugs, perhaps the defendant didn't feel it was necessary to protect the drugs with a weapon. [22] If it turns out it was an enormous amount of drugs, perhaps it may be relevant for other purposes.

THE COURT: What I am hearing, the sale took place at the pawn shop, the sales. Then Mr. Ingram is saying there were sales at home where he didn't have a weapon.

What relevancy is there to the amount? I guess possibly that can be relevant. However, I am going, Mr. Levin, to exclude the amounts and the sales that you intend to introduce unless the defendant comes on the stand and says these were smaller amounts at home. Then I would let you put your evidence on at that point.

MR. INGRAM: Your Honor, while I'm thinking about it, I don't know that any of that testimony would be relevant. The fact is, this is a charged count, which takes, on April 30th, sales actually behind the pawn shop. I don't know whether it's relevant that on some other occasions he didn't carry the weapon.

THE COURT: Then if it's not, and the Court says that's not relevant, then it's not relevant as to the amounts at the pawn shop.

MR. LEVIN: Certainly.

THE COURT: What I would rather do is exclude it at first, and then come back to it if it becomes necessary.

MR. LEVIN: That's fine, Your Honor.

THE COURT: All right.



[23] MR. INGRAM: Let me make sure that the Court is – knows what my position exactly is. I'm not objecting to evidence, for example, from the undercover agent that he bought marijuana at the shop on other occasions.

THE COURT: I understand.

MR. INGRAM: What those quantities were. And to respond to Your Honor's – one of Your Honor's points there, if – I anticipate that if my client testifies, and testifies about sales at his home, he would testify that – without testifying about specific amounts, he would testify that he, in fact, sold larger amounts at home than he did to the agent at the shop.

THE COURT: But then I think that's not the – may not be the entire line of questioning that would be relevant. It may be that he sold larger amounts at home than he did at the shop. But it's the amount that is available for sale that may be relevant, too.

He may have sold all that he had at home, and for instance sold five grams at a time, and sold only two grams at the shop, but he had a pound available at the shop. That might make a difference.

I don't know whether it will or not. I just don't want to rule on it until I hear what is said, because I think it does bear on the things that you're talking about, and I would rather reserve that right until the time comes.

MR. INGRAM: All right.

[24] Your Honor, on the second motion about the tapes, the objection was, it is my understanding there is only one tape of one recorded conversation, that is from

April the 29th, a recorded conversation there in the pawn shop, at which time one of the marijuana transactions took place.

And it's about, my guess, anywhere from 35 minutes to a 45-minute conversation. It's on two sides of a regular cassette tape. I did not hear that, through no fault of Mr. Levin. I did not get a copy of that tape to listen to prior to filing my motion.

I had seen Agent Boykin's report about that transaction, and in that report he indicated there was some statement by my client that – to the effect that they were talking about the gun in question; that my client admittedly was wearing on his hip at the time the transaction took place. And they started talking about the type of ammunition that was in it.

And by way of illustration, to tell the agent, or as far as he knew, tell the customer the power of that, he made some statement to the effect that the ammunition was powerful enough to penetrate the body on or kill a cop.

That, I contend, is inadmissible for three reasons: First of all, I have now listened to that type, [sic] and to me it is largely unintelligible, and I think so unintelligible that it becomes unreliable and, therefore, the Court should exclude it on that basis alone. I understand Your Honor would have to [25] listen to that before you could make that determination.

Secondly, I contend that it is irrelevant. Any discussion about the ammunition that was in the gun is irrelevant to the issue of whether or not the gun was being carried at that time in relation to the drug transaction. I



don't think even Mr. Levin would contend that the discussion about the gun and ammunition was about – was in the context of talking about a drug transaction, and what if the cop showed up, then this gun could kill a cop, if they showed up at a drug transaction.

This was in the context of a discussion about weapons in general, and this particular firearm that my client had on him at the time. They were talking about the power of the ammunition and type of weapon and compared it to other types of guns.

So, I contend it is irrelevant. I would be more concerned if we had a jury here, but I'm still contending that technically, therefore, aside from being irrelevant, if there is any minimal relevance, that relevance is outweighed by the prejudice, substantial prejudice to my client under Rule 403.

My understanding, finally, is that Mr. Levin intends to only play the 10 or 15 seconds out of that 30, 40-minute conversation, and I think that would make that 10, 15-minute second conversation portion become even more unreliable, unless Your Honor can hear the entire thing in its context to [26] understand this is not some discussion about drugs, sale of drugs, and if the cops show up, these bullets can kill a cop.

This was, I think, Your Honor would need to hear all of that to understand this was simply a discussion about in the context of being in a pawn shop where weapons are for sale, legally; that they were talking about ammunition in a gun that was legal, and this was simply an illustration that my client was giving.

So, basically, I say that it is too unintelligible to be reliable, and should be excluded; and secondly, it is irrelevant, and Your Honor would need to listen to it to determine its relevance; thirdly, if it has minimal relevance, the prejudice far outweighs any relevance.

THE COURT: I have a hard time with that one, Mr. Ingram. Certainly, the unintelligible part of it, as you say, I would have to hear that. If a person is charged, for instance, with conspiracy to kill game, deer, out of season, the fact that an individual who is accused of doing that did, in fact, sell a weapon to the hunter, and says here is a gun that will penetrate the body and expand, and you don't have to hit a deer in the heart for this shell to kill him, it seems to me would be relevant on the question of whether that individual who sold that gun may have been doing it for the purpose of a conspiracy to kill the deer. Maybe.

Now, that may be an off-the-wall example, but if an [27] individual is intent on buying contraband or illegal drugs, and the dealer puts a gun on the table and says that gun will take care of any police officers, that seems to me to be somewhat indicative of why the gun is there. And it may be that that was said for the purpose of just showing how powerful the gun is, but it may be argued on the other hand that it was more of a purpose of showing if police officers show up, that's what it is for.

Maybe a little clearer example would be if any DEA agents show up, that would penetrate their breast plate, even if they are wearing it, something of that nature. I'm not sure that I can find that that is completely irrelevant to this matter. And the prejudice, I think the Court is in a



position to handle a difficulty that a jury may not be able to handle on 403. However, to beg the question a little further, I would rather hear the case a little bit before I rule on any of those. I understand what your objections are.

MR. INGRAM: And, Your Honor, I certainly – if Your Honor is going to listen to it, I would urge the Court to listen to the entire tape, because – and so Your Honor understands the context, this was a discussion there in the pawn shop, not back in the back room or out back somewhere. This was a discussion with other people present, an ongoing discussion about other things. This was not in the context of any discussion about drugs.

[28] THE COURT: It was not?

MR. INGRAM: The drug discussion came later, or perhaps a little bit of it earlier, but then they go on and talk about lots of other things for an hour, or 30, 40 minutes anyway.

THE COURT: I think I would have to listen to the whole thing. Certainly, upon your request, I would listen to the whole thing. And if it did not occur, if it occurred at a time other than in connection with the drug trafficking, that is, your point is well taken.

However, if it's the third time that this person has showed up to buy marijuana, and the comment is made, it takes on a little more significance.

MR. INGRAM: Your Honor, this was actually the first time.

THE COURT: The first time. Okay. See, I don't know all of those peculiar facts to this case, and I simply can't rule on that, and we will take that as we come to it.

Do you wish to be heard any further, Mr. Levin?

MR. LEVIN: No, Your Honor. I think once the evidence is heard, the Court will understand.

THE COURT: All right. I certainly understand the motion, and I will welcome any objection that you might want to interpose at that time.

Mr. Levin, you have an opening statement that you wish to make?

[29] MR. LEVIN: I do, Your Honor.

THE COURT: You may do so.

MR. LEVIN: May it please the Court, Mr. Ingram, Your Honor.

The Government has the burden to prove beyond a reasonable doubt that the defendant carried a firearm during and in relation to a drug trafficking offense. We welcome that burden, Your Honor.

On April 29, 1999, Special Agent Joseph Boykin entered the Harris Pawn Shop. As you might guess, the Harris Pawn Shop is a pawn shop owned by the defendant. And in many ways it's like a typical pawn shop: It offers old TVs, sporting equipment, tools, even weapons hanging on the wall, all for sale.

In other ways it's not so typical, Your Honor, for the Harris Pawn Shop, in addition to offering legal merchandise, offered for sale marijuana.



So, on April 29, Special Agent Boykin walks into that pawn shop. He does not go in alone; he is with the defendant's half brother. And the defendant's half brother makes an introduction between the agent and the defendant.

And after some conversation, the defendant agrees to sell marijuana to the agent, and Agent Boykin buys the marijuana. As I indicated, Special Agent Boykin was not alone, nor was the defendant, for with the defendant, by his side, in his holster, [30] was sitting a nine millimeter semi-automatic pistol. And it was loaded. We know it's loaded because of the conversation that ensued between the agent and the defendant.

After the discussion about the weapon, they agreed to meet the following day for another distribution. So, on April 30th, which is the date that is reflected in Count 2 of the indictment, Agent Boykin goes to the pawn shop, and Defendant Harris is there.

This time, however, Defendant Harris directs Agent Boykin outside in a car parked behind the pawn shop. And while the two are in the vehicle, while the defendant is carrying his firearm in his holster by his side, the Defendant Harris sells 114 grams of marijuana to Agent Boykin. And Agent Boykin gives the defendant $360. And they leave.

And again on May 6, another sale takes place, and again the defendant is carrying a pistol in his holster by his side.

Your Honor, that's what we anticipate the evidence is going to show. And once the Court sees the evidence, we feel you will render a fair and just verdict.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Levin.

Mr. Ingram, do you wish to make an opening statement or reserve it?

MR. INGRAM: Yes, Your Honor.

THE COURT: You may.

[31] MR. INGRAM: Your Honor, we do not agree – we do not disagree with the evidence that is summarized by Mr. Levin, and likely will not disagree with the evidence that the Government will put on in its case in chief. That is, we agree and admit that Mr. Harris owned a pawn shop; that Agent Boykin came in on four occasions to purchase marijuana, and on the three occasions that Mr. Levin mentioned, April 29, April 30th and May 6, that Mr. Harris sold a relatively small quantity of marijuana to Agent Boykin, and each of those times he was carrying a nine-millimeter firearm by wearing it in a holster on his belt.

So, as to the elements of the offense, we agree that he carried – he carried a firearm, that he carried it during a drugs [sic] transaction, but we deny that the firearm was carried in relation to the drug transaction.

Our position is that the Government's evidence will simply show and prove beyond a reasonable doubt that he carried that firearm during the drug transaction, and we will contend in – our evidence we contend will show



that the firearm he carried was carried solely in relation to his pawn shop business.

In addition to the Government's evidence, we anticipate putting on evidence that the – that Mr. Harris has a federal firearms license to sell, or actually his father has a federal firearms license to sell, that the pawn shop used so they could legitimately sell firearms out of that location, and that, in [32] fact, they do buy and sell in the pawn shop firearms, televisions, other appliances, tools, jewelry, coins and so forth.

The evidence will also show that he deals only in cash. People who come in to pawn something only want cash, and he only deals in cash, and that he does not accept checks when somebody comes in and buys something, so that he deals only in cash. And at all times, not only has jewelry, firearms, other valuable items there, but that he has anywhere from 2 to $4,000 in cash in his cash drawer at any one time on any particular day.

Our evidence will show that he – his practice was that from the time he opened his pawn shop in the first location, and after he moved it to the second location where Agent Boykin found him, that he wore a firearm every day, all day, every hour of every business day, for the purpose of protection of the pawn shop.

There will be evidence that when he locks up at night, that he locks up the firearm in a drawer there in the shop, and never carries the firearm home.

There will be evidence that he has sold marijuana on other occasions at his home, and that he did not have a

firearm either on his person or anywhere in his house at the time he sold marijuana out of his home.

Finally, we will show that if it is not a standard in the industry, it is certainly a common practice in the pawn shop [33] business for weapons to be carried by the owner or manager or the person in charge, by showing that it is a practice in a number of other pawn shops.

Generally then, we contend that the evidence will show conclusively that Mr. Harris wore the firearm solely for protection in his business, as do virtually all other pawn shop owners, and it was simply a coincidence that he had on the firearm at the time of – the marijuana transactions took place, and, therefore, he was not carrying that firearm in relation to the drug transactions.

THE COURT: All right. Thank you, sir.

You may proceed, Mr. Levin.

MR. LEVIN: Thank you, Your Honor. The Government calls Joe Boykin.

JOSEPH ALEXANDER BOYKIN, GOVERNMENT'S WITNESS, SWORN DIRECT EXAMINATION

BY MR. LEVIN:

Q If you would please tell the Court your full name.

A Joseph Alexander Boykin.

Q How are you employed?

A I am a special agent with the United States Department of Treasury, Bureau of Tobacco, Alcohol and Firearms.



Q How long have you been so employed?

A I have been employed with ATF for seven years.

Q What are some of your responsibilities, Agent Boykin?

[34] A We investigate violations of the federal law involving explosives, arson, alcohol, tobacco, and firearms violations, including how they relate to narcotics trafficking.

Q How many investigations in the last seven years surrounding drug trafficking violations have you participated in?

A In the last seven years, probably around 100.

Q What kind of training have you received?

A I graduated from the University of South Carolina Criminal Justice Academy. Attended the South Carolina Criminal Justice Academy. I was a law enforcement officer in South Carolina for four years before becoming an ATF officer. Also attended the Federal Law Enforcement Training Center in Glynco, Georgia, criminal investigator school, and also graduated from the ATF national academy, also in Georgia.

Q Have you testified in court before?

A Yes, sir.

MR. LEVIN: Your Honor, at this time we would tender Special Agent Boykin as an expert in the field of investigating violations of drug trafficking laws.

MR. INGRAM: I will object to that.

THE COURT: In what area do you want him to testify as an expert?

MR. LEVIN: Specifically the tools of the trade that accompany drug trafficking crimes.

THE COURT: Mr. Levin, you have come into the U.S. [35] Attorney's office since this was done in this court, and I do not hold you responsible for it, but about four years ago I indicated to the U.S. Attorney's office that if they wished to qualify an agent as an expert, they could certainly do that. There were circumstances that they could, but that I would not want that expert to testify as to factual matters also before a jury, because he had a unique qualification which gave his factual testimony perhaps more relevancy than it would otherwise be entitled to.

Now, this is a judge trial and not a jury trial, but I am not sure that as a matter of expertise it needs to be shown. It seems to me that there is another area upon which this could be done, if it's relevant, and that is simply from his practice and experience in the field, without qualifying as an expert.

I have no problems in qualifying him, because this is a judge trial, and we are not involved with the same problem I would be involved with if it were a jury trial. But I mention that at this time only to let you know that that word probably has not filtered over to you; that if this were a jury trial, I would sustain the objection immediately and say either use him as a factual witness or an expert, but you can't do both of them.



MR. LEVIN: Okay.

THE COURT: In this case, Mr. Ingram's objection, let me see if he has any other objection that I am not considering [36] here.

MR. INGRAM: No, Your Honor.

THE COURT: All right. In that event, I am going to allow you to consider him as an expert in the field of investigations, but I am not sure what additional weight I will give to that. I will let both parties know at the time so that you will know what to do.

MR. LEVIN: Thank you, Your Honor.

THE COURT: All right.

BY MR. LEVIN:

Q Special Agent Boykin, did you have an opportunity to investigate the defendant for selling drugs on April 29?

A Yes, sir, I did.

Q Can you tell the Court what happened on that day?

A Well, on April 29, I accompanied a confidential informant, who is a half brother of Mr. Harris, a Rodney Deaton, to Harris Pawn Shop for the purpose of attempting to purchase a quantity of marijuana from Mr. Harris.

Mr. Deaton made the introduction of myself to Mr. Harris at the pawn shop. On this occasion I observed Mr. Harris walking around the pawn shop with a pistol on his waist in a holster, in a cross-draw fashion. It was on his

left side, or – and it was – he was right-handed, where he could reach across and draw the weapon if he needed to.

Q Had you ever met Defendant Harris before?

[37] A No, sir, I hadn't.

Q Do you see him in court today?

A Yes, sir, I do.

Q Could you just point to him?

A Yes, sir. He is seated at defense counsel table.

THE COURT: Let the record show that he has identified the defendant, Mr. Harris.

BY MR. LEVIN:

Q Let me show you what has been marked as Defendant's Exhibits 1, 2 and 3, and ask you to take a look at them, please.

A This is Harris Pawn Shop.

Q If I could just ask you about each picture, please.

A Yes, sir.

Q They are photographs, is that right?

A They are.

Q What does Government's Exhibit Number 1 represent?

A It's a photograph of Harris Pawn Shop. It shows if you're walking in the front door. The point of view would be looking to the right side of the pawn shop from the front of the pawn shop. It shows the various shotguns



and rifles that are for sale, and also numerous types of tools, television sets, and other assorted merchandise.

Q If you would, take a look at Government's Exhibit 2 for identification. What does that show?

A It is a picture of the defendant, Mr. Harris, standing in [38] his pawn shop wearing a Nike T-shirt and blue jeans.

Q And Government's Exhibit 3, could you please tell me what that shows?

A It shows an individual that I knew to be – by his nickname Scarecrow. A white male with red hair, relatively tall and thin, who was at the pawn shop on frequent occasions when I went there.

Q Do you see a scale in that picture?

A Yes, sir. I see a triple beam balance scale, which appears to be the same scale that Mr. Harris used to weigh the marijuana when I purchased from him.

Q Did you take these pictures?

A No, sir, I did not take them.

Q Do you know where they came from?

A They – to my understanding, they came from a videotape that was –

MR. INGRAM: Objection.

THE COURT: Do you know that yourself, that it came from the video?

THE WITNESS: I know the existence of the videotape, and the tape came from a search that – I was

on the search when it was seized, but I did not remove these photographs from that videotape myself.

MR. INGRAM: Your Honor, I will withdraw that objection.

THE COURT: It seems to me if he can identify this as [39] being relevant, and actually indicative of what was there, that that would be sufficient. All right.

MR. LEVIN: Thank you, Your Honor.

BY MR. LEVIN:

Q Do you know if a law enforcement officer took that video?

A Yes, sir.

Q Let me rephrase it. Did he actually film the video?

A No, sir.

Q Take a look, if you will, at Government's Exhibit 2 for identification.

A Yes, sir.

Q And that shows the defendant, is that right?

A It does.

Q Okay. Do you see on his person in that picture a pistol?

A No, sir, he is not wearing a pistol.

Q Thank you.

MR. LEVIN: If I could retrieve Government's Exhibits 1, 2 and 3, please.



Your Honor, at this time I would move into evidence what has been marked as Government's Exhibits 1, 2 and 3 for identification.

THE COURT: Do you know from your own knowledge the time that Exhibit 2 was taken?

THE WITNESS: No, sir, I do not know the exact time or date. I can only testify that it was at his new pawn shop on [40] Main Street in Albemarle, and I'm not sure exactly when he moved in there.

THE COURT: Does it mean that it was before or after the time of April the 30th?

THE WITNESS: I couldn't answer you honestly, no, sir. I do know it was before May the 18th.

THE COURT: So, are you saying that Government's Exhibit Number 2 is a picture of the defendant in another pawn shop?

THE WITNESS: No, sir, that's the pawn shop in question.

THE COURT: But you know it was after the opening of the new pawn shop?

THE WITNESS: I'm sorry, Your Honor. That is the new pawn shop. That is the pawn shop he was occupying when all of these transactions occurred.

THE COURT: So, it is the one he was occupying on April the 29th and 30th?

THE WITNESS: Yes, sir.

MR. INGRAM: Your Honor, I object to the introduction of Exhibit Number 2, since we don't know the time or date that that photo was taken.

THE COURT: Do you know that the pawn shop was open for business at the time this photo was taken? Do you know whether that was true or not, Mr. Boykin?

THE WITNESS: It appears to be, Your Honor, but I could not testify for a fact that it was before business hours or [41] after business hours.

THE COURT: I'm not sure the significance I put in that. I'm going to admit what is marked as 1 and 2-A, and I'm going to reserve 2 for a little bit longer.

MR. LEVIN: That's fine, Your Honor. Thank you.

BY MR. LEVIN:

Q Special Agent Boykin, have you reviewed the videotape?

A No, sir.

Q Once you arrived at the pawn shop and you talked to the defendant, how did the conversation proceed?

A It was a rather lengthy meeting, the initial time. The informant spoke to Mr. Harris to some extent. I didn't say a whole lot initially at first. As a matter of fact, most of my attention – I was talking to Mr. McRae, who is in the courtroom back there seated in the gallery, who was playing a guitar in the pawn shop.



Mr. Harris had some customers coming in and out of the pawn shop that he was interacting with. There were other individuals that came and went from the pawn shop.

Approximately 30 minutes went by before I actually got to the point of negotiating a marijuana transaction. And we arrived at that point in the conversation while Mr. Harris was standing in a rear counter in the back of the pawn shop, and when I indicated what I was there for, and what I would like to purchase, he pulled from underneath that counter a quantity of [42] marijuana and placed it up on the counter.

MR. LEVIN: Your Honor, if I could correct the record, I think I have been calling them Government's Exhibits 1, 2 and 3, the photographs. They were 1, 2 and 2 Alpha.

THE COURT: Two –

MR. LEVIN: 2-A.

THE COURT: I have admitted 1 and 2-A, but I have not admitted 2.

BY MR. LEVIN:

Q Now I would like to show you what has been marked Government's Exhibit 3 for identification, and ask you to take a look at it, please.

A This is the marijuana that I purchased on April the 30th from Mr. Harris.

Q And do you know how much that weighed?

A The weight we have is approximately 112 grams of marijuana.

MR. LEVIN: Your Honor, the defendant and Government have entered into a stipulation concerning the drug weight and results.

Your Honor, at this time the Government would move into evidence Government's Exhibits 3 and 4.

THE COURT: Well, 3 and 4 is the stipulation?

MR. LEVIN: Exhibit 4 is the stipulation, Your Honor.

THE COURT: All right. You may do so. Without objection, 3 and 4 are admitted.

[43] MR. LEVIN: If I could retrieve Government's Exhibit 3, please.

BY MR. LEVIN:

Q Special Agent Boykin, did you indicate to the defendant that you wished to make another purchase at another time?

A On the 29th?

Q Yes.

A Yes, I did.

Q And how did that proceed?

A After we had engaged in the transaction, and I purchased the marijuana I purchased from him on April the 29th, I asked him if I could come the following day and purchase some more marijuana from him, and he indicated that I could.



Q Did you have a conversation about a weapon during the course of the discussion of the sale of marijuana?

A Yes, sir.

Q Could you tell the Court about that?

A As we were concluding the transaction for the marijuana, he had brought the marijuana from the back counter up to the front counter, which is where his firearms were displayed on the wall, and then the pistols were in the counter underneath his cash register.

Right next to that was where he had his triple beam balance scales, which is where he weighed the marijuana that I purchased on the 29th. After I had paid him the money and made the [44] arrangement for the next transaction, the tape will bear this out, I recall –

THE COURT: Sustained as to what the tape will bear out. Go ahead.

THE WITNESS: We had a conversation. The informant commented about the firearm that Mr. Harris was wearing on his hip. I made a remark about it.

At that point in time, Mr. Harris removed the firearm from the holster, and was explaining that it was an outlawed firearm because it had a high-capacity magazine. He pushed the magazine release on the side of the pistol and allowed the magazine to come out of the bottom of the pistol, and showed – held the magazine out and showed us the ammunition that was loaded in the magazine.

He called the ammunition silver talent bullets that he said were homemade; that it was reloaded ammunition that had been fired, and then this special bullet was put back in it when it was reloaded to be shot again.

And he said that I could "F-up" a cop with this; that if he shot him, the bullet would go through his heart, after it went through his armored jacket.

BY MR. LEVIN:

Q Were you wearing a recording device at the time?

A Yes, sir. Actually, I was wearing a transmitter that was being monitored by detective –

[45] MR. INGRAM: I have a standing objection to this conversation.

THE WITNESS: – Detective Robert Eury.

THE COURT: Yes, Mr. Ingram, you have a standing objection to this line of testimony, based upon your motion in limine.

BY MR. LEVIN:

Q Special Agent Boykin, do you recognize Government's Exhibit 7 for identification?

A Yes, sir, I do.

Q What is that?

A This is the tape recording that Robert Eury made of my conversation.

Q Have you had a chance to listen to that tape recording?



A Yes, I have.

Q Does is [sic] it fairly and accurately reflect the conversation that you had with Defendant Harris?

A Yes, it does.

MR. LEVIN: With Your Honor's permission, I would like to play the portion of the tape that the agent just testified about.

THE COURT: And this is part of the 45-minute conversation?

MR. LEVIN: Yes, it is, Your Honor.

THE COURT: All right. Now, if you are sure that you [46] want to do that, I will listen to that at this point. However, if I listen to it, Mr. Ingram has moved that the Court should hear it all, and I will hear it all, if he wants to.

I guess there is going to be a contest on that, but let me first ask Mr. Ingram. You have heard this testimony from Mr. Boykin. Do you intend to contest what was said, and about the time that it was said, Mr. Ingram?

MR. INGRAM: May I have a moment to speak with my client about that?

THE COURT: Yes, sir.

(Mr. Ingram confers with Defendant Harris.)

THE COURT: Mr. Ingram, I want to make sure I am clear on what I have said here, and that is, if your client takes the position that what Mr. Boykin said is not accurate, I will hear the tape here for two purposes: One, as to what was actually said at that time; and if it does

show on there the approximate time in relation to the transaction that occurred.

So, I guess what that means is, if your client contests the credibility or believability, then I would grant Mr. Levin's motion to hear the tape.

So, tell me where you are.

MR. INGRAM: Your Honor, I do contest the facts that have been testified to about that conversation today.

THE COURT: All right.

MR. INGRAM: I will object to the tape being played on [47] the basis that it's virtually unintelligible. I know Your Honor has got to hear it in order to determine that.

THE COURT: Right.

MR. INGRAM: And I will, with Your Honor's permission, will reserve the right to play the entire tape in our case in chief if I feel like it's necessary after cross examination of Agent Boykin.

THE COURT: The second thing that I am concerned about is where in the course of the conversation did this occur. And I'm not sure from listening to that particular item that Mr. Levin has asked me to, that that will appear. But we'll just wait and see if it does.

MR. INGRAM: All right.

THE COURT: So, I'm going to grant Mr. Levin's motion to hear the tape at that point, subject to be reviewed again after we hear the matter.



MR. LEVIN: Thank you, Your Honor.

With the Court's permission, may Special Agent Boykin approach the tape recorder and play that portion of the tape?

THE COURT: He may do so.

(Tape played.)

THE COURT: The Court finds from listening to the tape that it is difficult, but not inaudible as to some parts, and that the tape does, in fact, support what was at least a portion of what Mr. Boykin said was the conversation that took place.

[48] I'm not finding that the tape doesn't support the other part, I'm simply not making a finding because I don't know about the rest of it. However, in order to put that in proper perspective, at this point there is testimony that that occurred after the marijuana was up on the counter and had been weighed. Mr. Ingram, I certainly would give you the right to ask the Court to listen to anything else in the tape to show that that occurred before anything else had happened in the pawn shop, because if it did happen before any information was known as to why Mr. Boykin was there, was simply there as someone who had come into the pawn shop for legitimate purposes, then I think there would be some question about the usefulness of that bit of evidence.

As it stands now, I am considering it on Mr. Boykin's testimony that it occurred after the marijuana was paid for and was up on the counter and had been weighed, and so I will give you the right to reserve the right to contest that.

MR. INGRAM: All right.

MR. LEVIN: Your Honor, Government's Exhibit 5 is a stipulation relating to the firearm that was seized from the defendant.

BY MR. LEVIN:

Q At this time I will ask Agent Boykin to look at Government's Exhibit 6 for identification.

A Yes, sir, I recognize that.

[49] Q What is that?

A This is a Taurus nine-millimeter pistol that was possessed by the defendant on the occasions I dealt with him.

MR. LEVIN: Your Honor, at this time the Government would move to introduce Government's Exhibits 5 and 6 for identification, Government's Exhibits 5 and 6.

THE COURT: Any objection?

MR. INGRAM: No, Your Honor.

THE COURT: Mr. Ingram.

BY MR. LEVIN:

Q And is Government's Exhibit 6 the same weapon that you were looking at on the April 29 purchase?

A Yes, sir.

Q Did you testify earlier that you set up or you arranged to meet Defendant Harris again?

A Yes, sir, I did.



Q And what did you all decide?

A I decided that I would contact him and meet with him the following day to purchase an additional quantity of marijuana on April the 30th.

Q What happened on April 30?

A I went again to Harris Pawn Shop, and met with Mr. Harris at the pawn shop. He again was wearing the firearm, as described before, on his hip, cross-draw fashion on the left side, same firearm that I had seen previously the day before.

[50] At this time it was different, in that Mr. Harris instructed me to follow him out of the rear door of the pawn shop into a rear parking area, which was a sand parking lot area behind or – behind to the right of the pawn shop.

There parked behind the pawn shop was a black Dodge Neon vehicle. Mr. Harris got in on the driver's side and instructed me to get in on the passenger's side. We both got in the vehicle, shut the door, and he cranked the car up. The car at this point was faced away from the front street, back towards the woods or the area behind the pawn shop.

He cranked the car up. We drove around in a circle. He pulled back up so as to face the front of the vehicle out towards the main street highway.

Q From that position, would the defendant have been able to see anybody coming up to the vehicle?

A Yes, sir.

Q Please continue.

A After we – the vehicle had been repositioned, he leaned over in the backseat and grabbed a knapsack, unzipped it, and pulled out four clear plastic bags filled with vegetable material, later identified as marijuana, and tossed them in my lap, if you will, rather than just hand them to me. Kind of threw them in my lap, and some of the marijuana was falling out of the bags on my clothes, and I was trying to gather them up.

I put the marijuana in my pants pocket. At that time I paid [51] him in undercover funds $360 for the marijuana, and he exited the vehicle. I exited the vehicle. He left a duffel bag in the vehicle. And still wearing the firearm, we walked back into the pawn shop, after which I departed out of the front door and got in my vehicle and left.

Q Were you able to see how much additional, if any, marijuana was left in the knapsack?

A There were numerous other clear plastic bags filled with marijuana that were remaining in the bag, other than what I purchased. I couldn't give you an actual weight because I didn't see them all laid out, but there were several ounce bags of marijuana in the duffel bag or knapsack.

Q How much money did you give the Defendant Harris that day?

A $360.

Q And that was for how much marijuana?

A Four ounces.



Q And, Special Agent Boykin, I may have misspoken earlier, but the marijuana you saw earlier, that 114 grams that you bought on April 30th –

A That's correct. I did identify that as being the marijuana that I purchased on April 30th earlier.

Q Did any customers approach Defendant Harris in the car?

A No, sir.

Q Were there any items from the pawn shop that you detected in the car –

[52] A No, sir.

Q – other than the marijuana?

A Just the knapsack.

Q Was everybody else in the pawn shop when you arrived on April 30th working there?

A I don't know if they were working there. I do recall, if I'm not mistaken, that the individual I described as Scarecrow was there. I don't see him in the courtroom. He is a rather tall, white male, red hair, often wore like a black Vietnam-style military-type hat, and would hang around the pawn shop frequently.

I don't know if he was employed there or just a friend of Mr. Harris, but he was there, and I guess he was looking after the pawn shop while Mr. Harris went outside to do the drug deal with me.

Q In your training and experience, what usually accompanies these drug trafficking violations?

A All types of paraphernalia, including firearms, cash, currency, pagers, cell phones, scales, baggies, razor blades, cutting agents, all of those sorts of things, sometimes scanners, and various types of things of that nature.

Q Now, on April 29, you indicated to the Court that you never met the defendant prior to going into his pawn shop?

A That's correct.

Q Did the defendant say anything to indicate to you whether or [53] not he trusted you after meeting you?

A Mr. Harris, throughout our transactions together, remained very skeptical. After the first occasion I never went back with the informant, I always went back by myself.

These occasions he commented about the antenna on the pickup truck I drove, called it a spy wire. Another occasion he asked if I was wearing a wire, wanted me to open up my clothes so he could see if I was wearing a wire.

On another occasion he asked me, he wanted to see my wallet to see if I had a badge in my wallet. But all of the while I was still purchasing from him, but he was never comfortable totally with me.

Q On May 6, did you go back to the pawn shop?

A Yes, sir, I did.

Q And did you make a purchase at that time from the defendant?

A Yes, sir, I did.



Q And was the defendant wearing a pistol at that time?

A Yes, sir, he was.

MR. LEVIN: I have no further questions, Your Honor.

THE COURT: Mr. Ingram, cross examination?

MR. INGRAM: Yes, Your Honor.

CROSS EXAMINATION

BY MR. INGRAM:

Q Agent Boykin, on April the 29th, did I understand you to say that while you were in the pawn shop that a number of customers [54] came and went during that time?

A Yes, sir.

Q How many?

A I didn't pay attention. I saw several folks come in and not buy anything and walk out, and I saw Mr. Harris have some conversations with the customers, but I didn't see if they bought anything. I couldn't give you an estimation.

Q How long were you there that day?

A I would say 45 minutes was a fair estimation; 35 to 40 minutes.

Q Were you talking with Mr. Harris most of that time?

A No, sir. I really didn't talk to Mr. Harris until we got to the end of that time period, when we actually did the drug deal and we left.

He was, like I said – he would speak to us occasionally, and spoke to his half brother some. But my actual conversations with him really didn't begin in earnest until right at the end of the tape. Actually, if you played the second side of that tape, that would probably cover the majority of my interaction with Mr. Harris.

Q What time of day was it that you went to the shop on April the 29th?

A It was in the evening. It's actually on the tape. I think it should be a preamble at the beginning of it. It was –

Q Sometime in the afternoon?

[55] A It was in the afternoon, yes.

Q And so, the shop was open for business at that time?

A Yes, it was.

Q As a matter of fact, it had a big sign on the front that said "open"?

A Yes, sir. Every time I dealt with Mr. Harris the business was open.

Q Now, in the conversation that you testified about concerning the ammunition, and the tape we listened to about that conversation, is it still your contention that the defendant said something about if he shot an officer it would go through the armor and into the officer's heart?



A Yes, sir. He said – I won't repeat the expletives he said, but he said he could blank a cop up, and then went on to elaborate that the bullet, the special ammunition he had would go through the armor, the officer's armored jacket, and penetrate his heart.

Q That conversation took place up in the front of the shop, is that correct?

A Yes, sir. That's where we had to relocate to do the drug transaction.

Q Did you say that that discussion began by Mr. Harris' brother-in-law making some comment about the weapon he was carrying?

A Yes, sir. As we moved to the front of the pawn shop where [56] Mr. Harris weighed the marijuana out, and I paid him very shortly following that, is when Mr. Deaton made a comment about the pistol he was wearing on his hip, and that's what elicited the response from Mr. Harris.

Q What did Mr. Deaton say?

A I have to listen to the tape again. He said something about damn, look at that gun, to some extent, or some remark thereabouts. And I think I made a comment, calling the firearm a-hog leg, which is a slang. And that was then followed by Mr. Harris pulling the pistol out, and our conversation you heard on the tape.

Q Now, you're aware, are you not, that Mr. Harris had a license, a valid license to buy and sell firearms back in April and May of this year, is that correct?

A He did not. His father was the licensee. He was just an employee of the pawn shop, selling under his father's license.

Q Right. I will stand corrected on that.

The pawn shop itself had a valid license for firearms to be bought and sold?

A That is correct.

Q And on April 30th, what time of day did you arrive at the pawn shop?

A It was – I'm not sure of the exact time. Again, that would be in the preamble of the tape, but the transaction occurred around 4:15 in the evening, in the afternoon.

[57] Q Again, the shop was open for business at that time, was it not?

A Yes, sir, it was.

Q How long were you there on that occasion?

A Not as long as the first occasion. I think that tape was somewhat shorter. I would say maybe 15 minutes, something like that.

Q And the male you referred to as Scarecrow was present on that occasion?

A Yes, sir.

Q And was anybody – did anybody else come and go during the time you were there?

A Not that I recall.

Q Is it possible that customers did come in and out during that time?



A They may have, while me and Mr. Harris were out in the vehicle.

Q Now, Mr. Levin asked you a few minutes ago if the exhibit of marijuana was the 114 grams that you testified about buying on April the 30th. Do you remember that question?

A Yes, sir.

Q Your testimony actually was it weighed out to be 112 grams, wasn't it?

A Actually, I need to look at the SBI lab report. That would have the actual laboratory weight. What I have in my report may [58] have been a crude weight when we initially weighed it ourselves.

Q You did observe the inventory in the pawn shop?

A Yes, sir.

Q Items that were for sale?

A Yes, sir, I sure did.

Q There were firearms for sale?

A Yes, sir.

Q Jewelry for sale?

A Yes, sir.

Q TVs and other small appliances for sale?

A Yes, sir.

Q Were these all weekdays that each time you went to the pawn shop?

A Yes, sir.

Q Now, you also testified that there are a number of items that commonly accompany drug transactions?

A Yes, sir.

Q For example, razor blades?

A Yes, sir.

Q Were there any razor blades involved in this transaction?

A No. He had a knife to be used. I bought a quantity of what he told me was opium, and it turned out not to be opium, and he had to cut it with a pocket knife, but he did have baggies and scales and so forth.

Q Are cutting agents involved in every drug investigation that [59] you have been involved in?

A No, sir.

Q Are scanners involved in every drug transaction?

A Not every one, no.

Q Are razor blades involved in every drug transaction?

A No, sir.

Q Are firearms involved in every drug transaction?

A No, sir.

Q Is this the only pawn shop you have ever been in?

A No, sir.



Q All right. So, you're familiar with the types of items that are sold in pawn shops?

A Yes, sir, I am.

Q And the items that were for sale or had been pawned in Mr. Harris' pawn shop were typical of pawn shops, is that correct?

A They were.

MR. INGRAM: Thank you. May I have just a moment, Your Honor?

THE COURT: Yes, sir, you may.

(Mr. Ingram confers with Defendant Harris.)

MR. INGRAM: That's all I have. Thank you, Your Honor.

THE COURT: Mr. Levin, do you have anything further?

MR. LEVIN: Nothing further, Your Honor.

THE COURT: Thank you. You may come down, Mr. Boykin.

THE WITNESS: Thank you, sir.

[60] (Witness excused.)

MR. LEVIN: Your Honor, the Government calls a short witness, officer Robert Eury.

THE COURT: Let's take a 10-minute break.

(Recess taken from 11:35 a.m. until 11:50 a.m.)

THE COURT: All right. Mr. Levin.

MR. LEVIN: Thank you, Your Honor. The Government calls Robert Eury.

Your Honor, if I can retrieve Government's Exhibit 2 for identification, please.

THE COURT: Exhibit 2?

MR. LEVIN: It's a photograph.

THE COURT: Exhibits 1 and 2? You just need 2?

MR. LEVIN: The one that was not introduced into evidence.

THE COURT: That's 2-A. No, it's 2. It's 2.

MR. LEVIN: Thank you, Your Honor.

ROBERT EURY, GOVERNMENT'S WITNESS,
SWORN DIRECT EXAMINATION

BY MR. LEVIN:

Q Could you please state your full name?

A Robert Michael Eury.

Q That's E-U-R-Y?

A That's correct.

Q What is your position, sir?

[61] A I am currently working with the Albemarle Police Department assigned to the multi-agent drug task force in Stanly County.

Q Have you been involved in the investigation of this case against Defendant Harris?

A Yes, I have.



Q Let me ask you to take a look at Government's Exhibit 2 for identification. Do you recognize the photograph?

A Yes, I do.

Q How is that – not technically speaking, but did that come from a videotape?

A Yes, it did.

Q Have you had an opportunity to view the videotape?

A Yes, sir, I have.

Q And do you know if the videotape was – well, do you know when the videotape was made?

A Not exact date, but I have a time range.

Q Why do you have a time range?

A The videotape was taped by Michelle Harris, the defendant's sister –

MR. INGRAM: Objection, unless he can establish.

THE COURT: If you know, then. Do you know that?

THE WITNESS: It was seized during a search warrant, and she is talking on the video, on the tape, while she is taking it. They do identify her as Michelle.

THE COURT: Who identified her as Michelle?

[62] THE WITNESS: Several people in the store. It would be the person earlier identified as Scarecrow, and Joey.

BY MR. LEVIN:

Q People on the videotape?

A Yes.

THE COURT: That would be hearsay information, wouldn't it?

MR. LEVIN: It's not relevant, Your Honor. It's actually not going to the truth of the matter asserted that it was Michelle that took it.

BY MR. LEVIN:

Q Do you know – well, do you know – that's fine.

Do you know if the videotape was taken during business hours of the Harris Pawn Shop?

A Yes, it was.

Q How do you know that?

A The family is running on the tape as they entered the store. There was a person inside the store doing some type of transaction, African-American male was there doing the transaction of some type of gold, which was weighed out on the scales.

Q Was it daylight?

A Yes, it was.

Q Thank you.

MR. LEVIN: Your Honor, at this time the Government would [63] move into evidence what has been marked as Government's Exhibit 2 for identification.



THE COURT: Mr. Ingram, what do you say to that? First of all, let me ask you, have you seen the video?

MR. INGRAM: Yes, sir, I have.

THE COURT: All right. Do you have any doubts that this picture came from the video?

MR. INGRAM: No, Your Honor.

THE COURT: All right. The question then, I guess I have, is that it is the officer's testimony that viewing the video it shows that the video is run during the time somebody was engaged in a purchase at the pawn shop.

Do we have any question about that?

MR. INGRAM: No, Your Honor. I don't object to the fact that this video was taken during business hours.

THE COURT: All right. Then I will admit Government's Exhibit Number 2.

MR. LEVIN: No further questions, Your Honor.

THE COURT: Mr. Ingram, do you have any cross examination on that?

MR. INGRAM: Yes, Your Honor.

CROSS EXAMINATION

BY MR. INGRAM:

Q Officer Eury, was it your testimony that the video showed a customer making a transaction with some kind of gold which was [64] weighed out on the scales?

A Yes, sir.

Q And those scales were on the counter?

A Yes, sir.

Q Correct?

A They are depicted in one of the pictures here.

Q And either Government's Exhibit Number 1, 2 or 2-A, that's the scales you're talking about?

A Yes, sir.

Q It's in one of those photographs?

A Yes, sir.

Q All right. Thank you.

MR. INGRAM: That's all I have.

MR. LEVIN: No further questions.

(Witness excused.)

THE COURT: Thank you. You may come down, Mr. Eury.

MR. LEVIN: With that, Your Honor, understanding that all of the Government's exhibits have been moved into evidence, the Government rests.



THE COURT: They are in. Mr. Ingram –

THE CLERK: We couldn't determine if the tape was admitted.

THE COURT: At this point the tape is admitted as to the portion that was played.

Mr. Ingram, first you have a motion that you wish to [65] make? Mr. Ingram?

MR. INGRAM: Your Honor, I do move for judgment of acquittal pursuant to Rule 29. And again, as I said in opening statement, I contend that the Government has simply proved beyond a reasonable doubt that Mr. Harris carried the firearm during the drug transaction, not that the Government has established that by any credible evidence that it was in relation to the drug transaction. Essentially, because he always had on the firearm when the officer went in, there is no indication that he – from the Government that he put on the firearm when the officer went in or took it off when he left.

There is simply that he carried it during the drug transaction, and it was at a time, all of those times, that the officers went in, were during a weekday, business day, during business hours. In a pawn shop, whereby the officer's testimony firearms, jewelry, appliances and so forth are there for sale, I think the implication then is that, obviously, there is a need for protection there.

Again, no evidence, I contend, that certainly not – not beyond a reasonable doubt, that the firearm was carried in relation to the drug transaction on April the 30th.

THE COURT: What would you say, Mr. Ingram, as to the Rule 29 with respect to the April 30th transaction where they left the pawn shop and went out to the car and conducted the transaction, and during that transaction officer Boykin saw [66] nothing except the knapsack with drugs in it? Does that change your position any on whether it's a jury question?

MR. INGRAM: No, Your Honor, it doesn't for me.

THE COURT: Okay.

MR. INGRAM: Going out. I mean to say, they left the pawn shop. It seems to me there is a distinction if they left the pawn shop and went blocks away or were gone for an hour and went somewhere else and transacted the business, and he did not take off the firearm, that might be significant; but the fact that they stepped outside within a few feet of where he was doing business, I don't think that adds anything to the evidence.

The mere fact that they stepped to the back of the store, or stepped to the back door, or stepped a foot outside the back door, or sat in the car outside the back door, he is still there at his business, which we contend is the reason why he had the firearm on.

THE COURT: All right, Mr. Ingram.

Mr. Levin, I'm inclined to deny the motion by Mr. Ingram, but if you have anything you wish to state, I will hear from you.

MR. LEVIN: Your Honor, since it is a bench trial, I'm hesitant to talk about case law, which is right on



point. So, I would rather not do that, and I will just let the Court rule.

THE COURT: All right. I will deny your motion at this [67] time. I think it is a jury question at this point.

Mr. Ingram, do you have evidence?

MR. INGRAM: Yes, Your Honor. First witness will be the defendant.

WILLIAM JOSEPH HARRIS, DEFENDANT HEREIN, SWORN

DIRECT EXAMINATION

BY MR. INGRAM:

Q State your full name, please.

A William Joseph Harris.

Q Mr. Harris, what is your current residence address?

A P.O. Box 164, Ansonville.

Q That's in Stanly County?

A No, sir, that's in Anson County.

Q Anson County. Fairly near to Albemarle?

A Yes, 29 miles.

Q What is your date of birth?

A July 7, 1977.

Q Prior to your arrest in May of this year, how were you employed?

A I was self-employed at Harris Pawn Shop.

Q When did you first open the Harris Pawn Shop?

A November of 1996.

Q What resources did you use and how did you go about opening that pawn shop?

A My mom got killed in a car accident, and I took the money [68] from the estate and I used it to open the business with it.

Q Okay. Did you use part of that money to pay the rent at first?

A Yes, I did, a good part of it.

Q And how did you develop your inventory?

A Pretty much through pawns, people losing stuff through pawns, and a lot of people walk in and just sell stuff straight up. That's pretty much how I started out.

Q And where was your pawn shop located when you first opened it?

A 250 South First Street. It was also in Albemarle.

Q In Albemarle?

A Yes, sir.

Q Had you operated that pawn shop in some location in Albemarle since November of 1996, that is up through May of 1999?

A Yes. Yes, sir.



Q In your business, do people over that two and-a-half, three-year period, have people brought in items to "pawn"?

A Yes. Yes, sir.

Q Would you describe what pawning an item means?

A Pawning an item is where a customer would come in – like I will use a VCR, for example – and want to borrow $25 against it and use it as collateral. I would loan the customer $25, and they would fill out an agreement to pay me back within 30 days [69] my $30, plus, you know, 22 percent interest.

Q And how long do you hold that item before they come back and pick it up? Do people ever come back and pick up an item that was pawned?

A Yeah. Yeah.

Q How long do they have to come back?

A 90 days.

Q If they do come back, then they pay you back the money plus interest?

A Yeah.

Q If they don't come back, what happens to the item?

A It's forfeited, and I put it on the floor to be sold.

Q Now, when people come in and bring an item, for example a VCR in the example you gave, do you give them cash?

A Yes, sir.

Q When you sell items in your shop, have you ever accepted checks?

A No, sir.

Q So, your business is entirely a cash operation?

A Yes, sir, strictly cash.

Q Describe or, if you would, tell the Court approximately at any – on any given business day, approximately how much cash you would have on hand.

A Anywhere between 2,000 to $4,000.

Q And, if you would, also describe the kinds of merchandise [70] that you have for sale and have taken on pawn in your shop.

A I have taken jewelry, guns, stereo systems, car speaker boxes, televisions, home stereo systems; just about anything that is, you know, of significant value.

Q When you take jewelry from someone who comes in and wants to borrow money against it, how do you determine its value?

A I weigh it on my scales, and then I multiply the weight by $3 a gram.

Q Let me show you what was marked as Government's Exhibit 2-A. If you would look at that photograph. Was that photograph taken in your pawn shop?

A Yes, sir, it was.

Q Do you know the person in that photograph?



A Yes, that's Ian Garner, I-A-N, G-A-R-N-E-R. His nickname is Scarecrow.

Q And do you see the scales in that photograph?

A Yes, sir.

Q What's the purpose of your having those scales there?

A To weigh gold.

Q Okay. You also used those scales to weigh the marijuana that you sold to agent Boykin, is that correct?

A Yes, I did.

Q What's the primary purpose that they're there?

A The gold weight.

Q And your shop did have a license to buy and sell firearms, [71] is that correct?

A Yes, sir.

Q Was that in your name?

A No, it was in my father's name.

Q Why was it not in your name?

A Because at the time I was only 18 years of age, and because I was so young and starting a business, I couldn't legally, acquire an ATF license. So, we had an ATF officer come down, I can't remember what his name is, but he told us just to put the license in my father's name as long as my dad was there.

Q Now, did you move your pawn shop from 250 South First Street at some point?

A Yes, sir.

Q Where did you move and when was that?

A I moved to 1953 East Main Street, and that was in, I would say, about June of '98.

Q Why did you move?

A It was a better location.

Q Since the time that you opened the pawn shop, has it developed into a business of which you can make a good living?

A Yeah.

Q When you opened your store in November of 1996, or at your first location, South First Street, what security measures did you have in the store?

A I had a – I just had – in the first pawn shop?

[72] Q Yes.

A I just had two motion detectors and a door break protection for the front door.

Q When you first opened the store at 250 South First Street, did you carry a firearm at work?

A Yes, sir.

Q What firearm did you carry at that time?

A At the time, I had a Tokaev.

Q Would you spell that?

A T-O-K-A-E-V.



Q Where did you get that firearm?

A I bought it from the Valor Corporation.

Q V-A-L-O-R?

A Yes, sir. It's a gun manufacturing wholesaler.

Q You owned that Tokaev nine millimeter legally?

A Yes, sir.

Q Did you carry that firearm every day, every hour of the day when you were open?

A Every hour.

Q How did you carry it?

A The Tokaev I kept concealed because I didn't have a holster for it.

Q How did you carry it?

A You want me to show you?

Q Describe it.

[73] A I had the – I had it behind my back above my left hip in my pants.

Q Why did you carry that firearm in your shop?

A Basically for protection against the kind of people I dealt with on a regular basis.

Q Did police officers regularly visit in your shop?

A Yeah, pretty frequently.

Q For what purpose?

A Pretty much they would come to collect the pawn tickets so they could observe what I had taken in, and compare them to the stolen reports in the city to pretty much check out stolen merchandise.

Q Did you try to hide the scales when the police officers would come in?

A No, they just stayed right there on the desk the whole time.

Q Were you wearing a firearm when the police officers came in?

A Yes.

Q Now, when you moved to East Main Street in June of 1998, did you continue to carry that same firearm?

A Yes, sir.

Q And in the new shop did you carry it daily?

A Yes, sir.

Q On every business day?

A Yes, sir. More so there because of the increase of people.

Q You had more customer traffic at that location?

[74] A Yes, I did.

Q When you left, after you had moved to the new location, when you left in the afternoon and closed up shop, what did you do with the Tokaev?

A The Tokaev, I put it in my showcase. It would be the first showcase to the left, in the bottom right-hand drawer, and I would lock the drawer.



Q And when you opened up the shop the next morning, what would you do in terms of the firearm?

A I would go ahead, and as soon as I would walk in the store I would turn around behind me and go and lock the door, and go and pick up the firearm and put it on my body before I went to the back and retrieved my money out of the safe.

Q How would you describe the security, other than carrying the firearm that you had, at the new location on Main Street, the security in your shop?

A At the new pawn shop?

Q Yes.

A I had two door-break protectors, I had three motion detectors, and I had what they call a blast-break protection. And it's a little box that hangs and it detects sounds, detects vibrations, and that way if somebody was to throw a rock through the window, it would automatically set off the alarm. That's pretty much what I had there.

Q Those security measures you set at night as you left in the [75] afternoon?

A Yes, sir.

Q At some point did you stop wearing the Tokaev nine millimeter and begin to use another firearm?

A Yes, sir.

Q What was the other firearm?

A The Taurus PT92F.

Q Was that the firearm that was marked as a Government's' exhibit this morning?

A Yes, sir. It's laying right there.

Q And when did you begin using that firearm?

A I would say about the beginning of February of this year.

Q Did you carry it – how did you carry it?

A I carried it in a holster on my belt.

Q From the time that you obtained that firearm, did you carry it everyday in the shop?

A Yes, sir, everyday.

Q Did you carry it and store it overnight in the same manner that you had the Tokaev?

A Yes, sir, I did. I left it there at night.

Q So, the only difference was, this one you had a holster and wore it on your belt?

A Exactly.

Q Compared to the Tokaev that you wore behind your body inside your pants?

[76] A Yes, sir.

Q Let me show you what I have marked as Defendant's Exhibits 1 and 2. First of all, Defendant's Exhibit 1, do you recognize those photographs?

A Yes, I do.

Q There are two photographs on that page, is that correct?



A Yes, sir.

Q One of the photographs is a close-up of you, is that correct?

A Yes, it is.

Q What is that in the background, is that your shop?

A Yes, it is.

Q And the other photograph has a picture of another person. Is that also taken in your shop?

A Yes, sir.

Q Do you know approximately – first of all, who is in that other photograph?

A Ian Garner.

Q Does the fact that – what is he wearing on his hip?

A He is wearing a Taurus PT92.

Q Does his presence there in that photograph tell you about what time – what date in time that photograph was taken?

A It had to be about mid-January.

Q Okay. Why was he there on that occasion?

A He just helped me out sometimes. He lived down with my dad. [77] He didn't have nothing else to do, so he just come around and would hang out.

Q Is the nine millimeter that he has on in that photograph the nine millimeter Taurus that you were wearing when Agent Boykin came in?

A Yes, it is.

Q And that's the same as the one that was marked as a Government's exhibit this morning?

A Yes, sir.

Q How did you obtain possession or ownership of that firearm?

A Ian Garner gave it to me at about the end of January.

Q Okay. And showing you Government's Exhibit 2, are there two photographs on that page?

A Yes, sir.

Q The bottom photograph, what does that depict?

A It looks to me like a customer entering the store.

Q That's the front of your store?

A Yes, sir.

Q Okay. The top photograph in Government's Exhibit 2, if I can direct your attention to that. What does that show?

A It shows me approaching the front.

Q And is that very close to being the same photograph that was previously marked as Government's Exhibit 2?



A Yeah, that's – this photograph was taken about three steps before this one.

[78] Q You're aware that those photographs, still photographs, were taken from a videotape, is that correct?

A Yes, sir.

Q And you have seen that videotape, is that correct?

A Yes, I have.

Q And the videotape at some point depicts you walking from the back of the store toward the person holding the video camera in the front of the store, is that correct?

A Yes, it does.

Q So, the photograph of you on Defendant's Exhibit 2, and the photograph of you in Government's Exhibit 2, both are still photographs from that video of you walking toward the front of the store?

A Yes, they are.

Q Are you carrying a firearm in those photographs?

A Yes.

Q How do you know that you are?

A Because I never didn't. I never – I never – I was never open when I wasn't armed.

Q And those photographs are prior to Mr. Garner giving you the Taurus?

A Yeah.

Q So, at that time you were still wearing the Tokaev?

A I was still using the Tokaev, yes, sir.

Q How does it compare in size to the Taurus that you were [79] wearing in April and May of this year?

A Well, the Tokaev only had a nine-round magazine, and the Taurus had a 15-round magazine. So, the butt of the gun was a little thicker on the Taurus, and the Tokaev gun was real thin. It was a single-action gun, wasn't really reliable.

Q And again, when did Mr. Garner give you that firearm?

A About the end of January, 1999.

Q Why did he give it to you?

A As a Christmas present.

Q Now, you did sell some marijuana to Agent Boykin in your shop in April and May of this year, is that correct?

A Yes. Yes, sir, I did.

Q Was that at least the occasions of April 29th, April 30th, and May 6th?

A Yes, sir.

Q Were you wearing the Taurus on each of those occasions?

A Yes, I was.



Q On April the 29th, when did you first put on your hip the Taurus firearm on that particular day?

A It would be about ten o'clock a.m., when I opened.

Q How about on April the 30th?

A 10:00 a.m., when I opened.

Q And on May the 6th?

A 10:00 a.m., when I opened.

Q And on each of those days, when would you take off the [80] Taurus?

A As soon as all of the customers were gone and it was after six o'clock.

Q What would you do with the Taurus at the time you closed up each day?

A The same as the Tokaev: I would remove the holster from my belt, and I would put it in my showcase drawer in the bottom right-hand drawer, and I would lock it.

Q After Mr. Garner gave you the Taurus nine-millimeter firearm, did you ever again wear the Tokaev nine-millimeter at the shop?

A No, sir.

Q What happened to that firearm?

A I sold it.

Q Did you sell it out of your shop?

A Yes, sir.

Q So, you basically put it in your display case?

A Yes. I logged it into my gun log, and I distributed it to a licensed individual.

Q Each time that Agent Boykin came in you were wearing the Taurus, weren't you?

A Yes, sir.

Q Why?

A For protection against, like I said, the kind of people that I dealt with regularly.

[81] Q Now, on April the 29th, we heard some testimony and listened to a taped discussion about the Taurus and ammunition that was in it?

A Yes, sir.

Q On the tape, and in that conversation, did you say something to the effect that the magazine to that firearm had been outlawed?

A Yes, I said that, but I meant that – it wasn't outlawed, they just quit manufacturing that particular model of gun.

Q So, the model that you had, had a 15-shot magazine, is that correct?

A Right, and they discontinued producing that gun.

Q And the model that succeeded the model that you had, what kind of magazine did it have?

A Excuse me?



Q You said the model that you were wearing had been discontinued?

A Right.

Q And it had a 15-shot magazine?

A Yes, sir.

Q How was the newer model different from the one you had?

A I don't know.

Q Okay. You don't know if it had a 15-shot magazine?

A Naw.

Q Was there anything illegal, as far as you know, about that [82] firearm?

A No.

Q Now, you also had a discussion about the ammunition. Would you tell, for the Court, what you were describing there? Describe the ammunition that was in the gun.

A I was describing the hollow points that are in it, and they ain't nothing but hollow points, reloads.

Q What is a reload?

A Like I said, my friend Ian, in the pictures here, was in the military, and he likes to reload whenever – whenever you shoot your bullet and it comes out, you take the casing and you put gun powder back in it, and you put another bullet cap back on top of the shell.

Q So, you use a shell that has already been fired, and there is nothing left from it but the shell, and make a new bullet out of it?

A Yes, sir.

Q Did you make a statement in that conversation about the firearm that – to the extent that this could "F-up" a cop?

A Yes, I did.

Q And why did you make that statement?

A That was – I don't know. I don't know.

Q Now, you did have police officers who regularly came in your shop?

A Yes, sir, I did.

[83] Q You know them on a first-name basis?

A Yes. I got along with them fine.

Q Now, in April and May of 1999, were you selling marijuana occasionally to persons other than Agent Boykin?

A Yes, sir.

Q Were you making a lot of money selling marijuana?

A No.

Q How many other persons, approximately, were you selling to in the spring of 1999, other than Agent Boykin?



A I had four customers before I was introduced to him.

Q How would you describe your relationship with those four people?

A They are – all of them are real good friends of mine.

Q So, Agent Boykin would have been the fifth person that you were selling to?

A Yes, sir.

Q And the only person who was not a friend of yours?

A Yeah.

Q Did you always sell marijuana, every time you sold marijuana, in your shop?

A No.

Q Where else did you sell marijuana?

A From my house.

Q When you did sell at the shop, did you always have the Taurus on?

[84] A Yes.

Q Why?

A Just because, like I say, I wore it on a regular basis daily in the business.

Q Now, when you sold marijuana at your home, did you wear a firearm?

A No, sir.

Q Was there ever a firearm in your house anywhere when you sold marijuana there?

A No, sir.

Q Have you ever had a firearm in your home?

A No.

Q If you sold marijuana out of your home, what happened – where was the Taurus?

A If I was at home, it was at the pawn shop in the drawer locked up.

Q Did any of the four friends of yours who bought marijuana from you wear firearms when they came to purchase?

A No.

Q Now, from the first of this year through the end of May of this year, would you sell marijuana out of your shop everyday?

A No.

Q Approximately how often per week might you make a sale at your shop?

A Probably just a couple times a week.

[85] Q Did you sell more frequently to your four friends at your shop or at your home?

A To my friends, they were just coming by the house.



Q And if you sold – if they more frequently came by your home, why would there be occasions then you would sell to them in the shop?

A Like one of my friends lived down in Mount Gilead, and the other one lives in Moncure, and he come, and he worked at Imperial Homes, and it's just right around the corner. And he would call me the night before and say what he intended to get from me, and I would bring it to the store for him the next day.

Q Do have you a valid North Carolina driver's license?

A No, sir.

Q Why is that?

A I had a DUI in 1997.

Q Thank you. Thank you.

MR. INGRAM: That's all I have, Your Honor.

THE COURT: Mr. Levin?

MR. LEVIN: Thank you, Your Honor.

THE COURT: Mr. Levin, without limiting you, how long do you think cross examination may take?

MR. LEVIN: Your Honor, it's really hard for me to say.

THE COURT: Maybe this is a good time to take a break then. We'll take a lunch break now. Any reason we can't come back in, let's say, at 20 minutes to 2:00? Has anybody got [86] anything that would prohibit them

from doing that? Let's take a break until 20 minutes to 2:00.

(Recess taken from 12:25 p.m. until 1:40 p.m.)

THE COURT: Mr. Harris, if you would, come back to the stand, please, sir.

Mr. Harris, you're still under oath from this morning. Mr. Levin.

MR. LEVIN: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. LEVIN:

Q Mr. Harris, you've owned a pawn shop since November '96, is that right?

A Yes, sir.

Q And you have had two pawn shops total?

A Yes, sir.

Q And how long have you been selling drugs?

MR. INGRAM: Objection.

THE COURT: Overruled.

THE DEFENDANT: I guess since I was about 16.

BY MR. LEVIN:

Q How old are you now?

A 22.



Q You started selling marijuana since you were 16?

A Yes, sir.

Q Where do you get the marijuana?

[87] A Do what?

Q Where do you get the marijuana?

A I got it from my sister's boyfriend.

Q Does he live at your sister's house?

A Yeah.

Q You have been to that house?

A Yes.

Q You have seen marijuana in that house?

A Yeah.

Q Have you ever carried a weapon to that house?

A No.

Q You have seen weapons in that house?

A Yeah.

Q Several weapons?

A Yeah, four rifles.

Q And a pistol?

A I have never seen a pistol over there, just what they have hanging on the wall.

Q Do any rifles not hang on the wall? Are there any rifles that are not on the wall?

A No, sir, not that I can recall.

THE CLERK: Government's Exhibit Number 8 marked.

BY MR. LEVIN:

Q Mr. Harris, let me show you what has been marked Government's Exhibit 8 for identification. Do you know where [88] this picture has been taken?

A Looks like – it looks like the corner of my sister's bedroom. That's the fish tank right there.

Q Do you see a rifle in that picture?

A Yeah.

Q Is it hanging on the wall?

A No.

MR. LEVIN: If I can retrieve the exhibit.

I would like to move this into evidence, Your Honor, as Government's Exhibit Number 8.

THE COURT: Any objection, Mr. Ingram?

MR. INGRAM: No, Your Honor.

THE COURT: It's admitted.

BY MR. LEVIN:

Q How long have you been buying drugs from your sister's boyfriend?



A About eight months.

Q Before that, where did you buy the drugs?

A A guy named Levi.

Q Is that in Stanly County?

A Yeah.

Q How long did you buy drugs from him?

A Just a couple years, probably.

THE COURT: What is Levi's last name?

THE DEFENDANT: Crawford.

[89] BY MR. LEVIN:

Q Before you bought the drugs from Levi Crawford, where did you buy the drugs?

A From a guy named Shane Rummage, R-U-M-M-A-G-E.

Q How long did you buy drugs from Mr. Rummage?

A Since 1992.

Q What kind of drugs did you buy from these individuals?

A Marijuana.

Q Only marijuana?

A Uh-huh (affirmative.)

Q Is that a yes?

A Yes, sir.

Q Did you offer for sale opium to Agent Boykin?

A Yeah.

Q It wasn't opium, was it?

A No, sir.

Q You were not being truthful when you identified it as opium?

A I thought it was. That's what I was told.

Q Where did you buy it?

A From a guy named Gene Scott.

Q How much marijuana would you say you purchased in total from all these people over the last six years?

MR. INGRAM: Objection.

THE COURT: Overruled.

BY MR. LEVIN:

[90] Q Let me ask that again. Approximately how much marijuana would you say you purchased, from the individuals you identified, over the past six years, dating back to 1992?

A I don't know. Probably, I would say, between 8 and 12 pounds total.

Q How many times have you visited these individuals?

A Not – rarely. It was a monthly, bi-weekly, every other week sometimes. I wouldn't get that much, though.



So, really, if you add it up, it wouldn't – it wouldn't be that much.

Q Did you have a pound in your knapsack on April 30th when you sold to Agent Boykin marijuana?

A I don't recall exactly what incident that was. Be more specific and I would answer for you.

THE COURT: Let him get his question out, then you can answer.

BY MR. LEVIN:

Q When you were in the vehicle behind the pawn shop on April the 30th, how much marijuana did you have in your knapsack?

A Eight ounces.

Q Is that in addition to the 114 grams that you sold to Agent Boykin?

A That was altogether.

Q Did you indicate to Agent Boykin, after he paid you the money, that you now had enough to go pay your supplier?

A I don't recall.

[91] Q Do you recall going to pay your supplier after Agent Boykin gave you the $360?

A I don't recall.

Q Did your supplier front you the drugs?

A Sometimes.

Q And then did you go pay your supplier after you made money from the sales?

A Yeah, whenever I got the money together.

Q Since 1996, since you opened up the first pawn shop, how many marijuana customers did you have?

A At first I only had a couple. Then I just – they just – a couple of their friends. Like I say, I didn't sell to but – about four people in the last three years.

Q In the last three years you have only sold to four people?

A I had four friends that bought from me.

Q You didn't have anybody else?

A No.

Q You had Agent Boykin.

A I mean, I had four people I dealt with until I was introduced to Mr. Boykin there.

Q So, prior to April 29th, you only dealt with four people?

A Yes, sir.

Q And what were their names again?

A Garland Pucket, Lee McRae, and a guy named Rick Wood, and my brother Rodney Deaton.

[92] Q And is Rodney your half brother?

A Yeah, he is my half brother.

Q Did Rodney bring other customers in like he brought in Agent Boykin?



A Yeah, he did before.

Q That would be four people, plus people Rodney brought in?

A Well, he brought – like I said, he would come up there and get it for other people.

Q Did he ever bring anybody else with him?

A I think he brought a guy up there, one guy named Chip Coyer.

Q So, now we have six people, including Agent Boykin?

A Six?

Q You have your four friends, Agent Boykin, and now Chip Coyer?

A Right.

Q Anybody else?

A Not that I know of.

Q Do you recall April 28, that is the day before you met Agent Boykin, did your half brother come visit you?

A Yeah, he sure did. He had a female with him. That's right. Yeah, sure did.

Q So, is that seven now?

A Uh-huh (affirmative.)

Q And you sold marijuana to her?

A Uh-huh (affirmative.)

[93] Q Is that a yes?

A Yes, sir.

Q Do you recall how much you sold to her?

A I think it was a half ounce that day.

Q How much did you get for a half ounce?

A $60.

Q Did you pay her $100?

A Huh?

Q Excuse me, did she pay you $100?

A No, sir.

Q How often would Rodney come visit you in the store?

A Oh, I would say Rodney only come around about twice a month.

Q And each time he came by, was it for the purposes of buying marijuana?

A No, sir. He is my brother. He just come around a lot of times to look at what I had.

Q Do you recall now – do you recall that he brought anybody else with him other than –

A No, because most of the time he come up there, you know, he would be getting whatever for somebody else, you know.

Q You indicated that – strike that. You have two businesses, don't you?



A No, sir, I only had one.

Q What is your one business that you identified?

A Harris Pawn Shop.

[94] Q Okay. Were you also selling marijuana? Would you call that another business?

A No.

Q You made money on it, didn't you?

A No.

Q You didn't make any money?

A No.

Q So, why did you sell marijuana?

A Basically, to be honest with you, I sold marijuana so what I would have left over I would have for free and wouldn't have to buy myself.

Q In that respect you made money, didn't you? You were getting something for free?

A Yeah, if you look at it like that.

Q So, then, it's a business, isn't it?

A No.

Q You had scales in your pawn shop?

A Yes, sir.

Q And you used those scales for weighing gold?

A Yes, sir.

Q And the gold is weighed and sold in the pawn shop?

A Yes.

Q You also used the scales to weigh your marijuana –

A Yes, sir.

Q – when you sold marijuana at the pawn shop?

[95] A Yes.

Q You also sold marijuana behind the pawn shop?

A Right.

Q So, the scales had two purposes, didn't they?

A Basically, yeah.

Q Now, when you carried a weapon, did you indicate earlier you never carried a weapon outside the pawn shop?

A Yeah.

Q So, you never carried a weapon – from 1996, you never carried a weapon outside of that pawn shop?

A Well, I had a storage building out back, and like people – I had lawn mowers and stuff out there that people pawned, and I would go out and walk out the back door to the storage building, and come back in the building. If I was to go next door to the neighbor's business, I would walk over there with it on. Like when me and him went outside the back door, we weren't out there five minutes, and come right back in.

Q You indicated earlier you were pulled over – that you were convicted of a DWI?



A Yes, sir.

Q And that was April of '97, is that right?

A I can't exactly recall, but I'm pretty sure it was in '97. I think it was in April, yeah.

Q Do you recall if you were carrying a weapon on your person at that time?

[96] A I had a weapon in the trunk of my car that was broken.

Q So, you had – how did that weapon get in your car?

A Me and my father had just ordered a pair of Rossi .38 Specials from Valor. And we were going to carry those firearms before we bought the Tokaev, the second firearm. And we had both purchased a .38 Rossi apiece, and it's got a little lip on it that comes out and the bullet would slide back and it wouldn't allow the chamber to rotate.

And I took it from the pawn shop that day to my house in Mount Gilead to shoot it, because I just bought it in the mail. And it didn't work, so I put it in an answering machine box and put it in my trunk.

Q Any other times where you were carrying a weapon outside of your pawn shop?

A No, I didn't carry it outside the pawn shop.

Q Well, it was in your car.

A Yeah, that was the – yeah, I took that home just because I just bought it that day.

Q Now, you had never met Agent Boykin prior to April 29, is that right?

A Um-hum (negative), no, sir.

Q So, you didn't trust him, did you?

A Well, I didn't really trust him, but, you know, my brother brought him in here and introduced me to him, so I kind of took my brother's word on it.

[97] Q You questioned him about the antenna on his car?

A Yeah, I'm pretty sure I did.

Q Now, have you ever conducted your pawn shop business outside of the pawn shop?

A No, not unless you count like going outside the – going outside the door to see what somebody had in their car. If somebody would say I got a TV out here, come look at it, I would go out of the pawn shop and look at it.

Q All of your pawn shop sales, are they all within the pawn shop?

A Yes.

Q There is a cash register in there?

A Yes, sir.

Q On April 30th, you had directed Agent Boykin out to the car in the back of the pawn shop, is that right?

A Yes, sir.

Q Is that your car?



A No, sir, it wasn't.

Q Whose car was that?

A That was Lee McRae's car.

Q Did he give you the keys?

A Yes, he did.

Q You didn't have a driver's license at the time?

A No, I didn't.

Q And you drove the car around in circles and you repositioned [98] the vehicle, didn't you?

A Yes. It was parked in front of my storage building. I got in the car, I reversed it, and then I pulled up beside the door and stopped.

Q You had a better vantage point to see if anybody was coming up to you on the street?

A Right, uh-huh (affirmative).

Q Is that a yes?

A Yes, sir.

Q That's why you did it?

A Right.

Q Who were you expecting to come up to you?

A Nobody. I was just watching out. I was watching to see if any cars pulled up to the front, customers, so I could go back in the store.

Q Was anybody in the store?

A Yeah, I'm pretty sure Lee was in the store, and Scarecrow was in the store.

Q So, there were two people who were doing business in the store?

A Right.

Q So, they didn't need your help to go in the store if the customers came in?

A Yeah, because neither one of them worked for me. They would just look out if a customer come into the store, and they would [99] be like, here, hold on, he'll be right back. I did mostly all of the transactions of any kind.

Q They would have come got you if need be?

A Yes, sir.

Q Meanwhile, you were in the vehicle with Special Agent Boykin, and you sold him marijuana, is that right?

A Yes, I did.

Q You were carrying a weapon at the time?

A Yes, I was.

Q You were carrying the weapon that's been admitted into evidence?

A Yes, I sure was.

Q And why did you carry the weapon in the pawn shop?

A Basically, because the people I dealt with regularly, you know, a lot of people would get violent if you



didn't want to give them the money they wanted. They would start, you know, cussing at you and wanting to fight and all kinds of stuff. And you would have groups of people coming in sometimes, and they would be looking like they were going to rob you. Basically for reasons like that. Basically the reason I carried the firearm is because of the cash I kept there.

Q Now, what did you do with the cash that you made from the drug sales?

A Do what? That I made?

Q Yes.

[100] A I never didn't really profit nothing.

Q You got $360 from Special Agent Boykin?

A Right.

Q What did you do with that money?

A I put it in my wallet.

Q Did you always put the money in the wallet?

A Yes. Then I would take it over to my sister's boyfriend.

Q To pay him back because he fronted you the drugs?

A Right. Or if I bought it, then, you know, I would put the money back.

THE COURT: What's that now? If you bought it?

THE DEFENDANT: If I didn't get it fronted, if I went over to his house and paid him cash for it, then I would pay myself back with the money.

THE COURT: Where would you put that cash?

THE DEFENDANT: Back in the pawn shop.

BY MR. LEVIN:

Q In the cash register in the pawn shop?

A Yeah.

Q So, you carried your weapon to – was it to deter people so that these criminal elements or these elements that were attracted to the pawn shop, was it to deter them from robbing you?

A Yeah, hopefully.

Q Were you prepared to use it if you had to?

[101] A Yeah.

Q Have you been trained on that weapon?

A No.

Q Did you ever go to the shooting range?

A Uh-huh (affirmative.)

Q Yes?

A Yes, sir.

Q So, you knew how to use it?

A Yes, sir.

Q And you were prepared to use it?



A Yeah.

Q Now, if somebody robbed you while you were – if they robbed you of your pawn shop merchandise, would you make a report to the police?

A Yes, sir.

Q You wouldn't hesitate to do that, would you?

A No.

Q If they robbed you of your drugs, would you still report it to the police?

A Well, no.

Q That's because it's an illegal substance, right?

A Exactly.

Q And you would get in trouble?

A Right.

Q So, the weapon would help you defend yourself against [102] would-be thieves?

A Right.

Q And you were prepared to use it? And you were prepared to use it?

A Yeah.

THE COURT: Your answer?

THE DEFENDANT: Yes, sir.

BY MR. LEVIN:

Q And you knew the police wouldn't help you if these thieves came and robbed you of your drugs?

A Right.

MR. LEVIN: Your Honor, I don't have any further questions.

THE COURT: Mr. Ingram?

REDIRECT EXAMINATION

BY MR. INGRAM:

Q Mr. Harris, before you opened your pawn shop, had you had any experience or did you know anyone who had any experience in the pawn shop business?

A Yeah. My dad run a pawn shop in Siler City for five years.

Q Did you consult with him before you opened your business, about the type of inventory and how to run the business?

A Yes, I did. He helped me out for about the first year.

Q Did he make any suggestions to you about security?

A Yes, he did.

[103] Q What suggestions did he make to you?

A Burglar alarm and a fire alarm.

Q Thank you.

MR. INGRAM: That's all I have.



THE COURT: Anything further, Mr. Levin?

MR. LEVIN: No, Your Honor. Thank you.

EXAMINATION

BY THE COURT:

Q Mr. Harris, help me understand this line that you're drawing here.

You carried a firearm because you thought some people that were engaged in the legitimate business of pawning may get upset or may get violent, is that right?

A Yes, sir.

Q What was your opinion of people who used and attempted to buy illegal drugs?

A Excuse me, could you rephrase that?

Q Was your opinion that those people could get upset and be violent?

A No, because the only people I sold to, like I said, were my friends.

Q You didn't know anything about Mr. Boykin's temper, did you?

A No, I didn't.

Q But if one of your friends had gotten violent or upset, would you have used the gun in the sale of marijuana?

[104] A No, sir.

Q You would not?

A No, sir.

Q But you would use it in connection with somebody who does the same thing, getting upset in connection with pawning?

A Well, basically just for robbery protection.

Q All right. If somebody tries to rob your stash or not pay you, you would use your gun?

A Yes, sir.

Q What if a marijuana purchaser decided not to pay you, would you use your gun?

A No.

Q Why not?

A Because, like I said, it's the people I dealt with were my friends.

Q But I'm saying, if someone had not been willing to pay you, would you have used your gun?

A No.

Q That's what I don't understand. Why would you use it on people that were not buying marijuana, but wouldn't use it on people who might be using marijuana or purchasing marijuana?

A Because, basically with the pawn shop I was protecting my money and my inventory.



Q Well, if you had marijuana and cash, you would be protecting it both ways, wouldn't you, legitimate sales and illegitimate [105] sales? That's what I don't understand. And I want you to explain to me why you would use your gun to protect your legitimate source of income and not use it to protect your illegitimate source of income.

That's what I hear you saying. Now, why?

A I don't know. I just – like I say, I never had an incident. I never thought of it.

Q All right. If that be the case, did you carry your gun to protect yourself only in the sale of legitimate goods, or did you carry your gun to protect yourself and your property in the event that anybody tried to rob you?

A Yes, sir.

Q Well, then, how do you exclude drug people in that event, then? Do you understand what my question is?

How can you say that you carried the gun to protect yourself from your – for your legitimate sales and property, and not your illegitimate sales and property?

A I just did it. I mean, I never – I never – I never thought about using it up against anybody that was trying to buy drugs.

Q Did anybody ever give you a problem in buying drugs?

A No, sir. That's what I mean, I never had an incident. If somebody would have robbed me, I would probably had to just fold on it because I couldn't call the police and tell them this guy tried to steal my drugs.

[106] Q So, are you saying you wouldn't have used it?

A What's this?

Q If somebody was there to buy drugs either grabbed your supply and ran or grabbed your money –

A No, I wouldn't use the gun. I would only use the gun if my life were in danger.

Q Well, that's true with your legitimate?

A Right.

Q So, if somebody held you up who had come there to pawn some things, you would use your gun?

A Well, it really depends on the situation, because –

Q Give me a situation that you would use it in a legitimate transaction.

A If I felt as if I had time to pull the gun out and actually use it to protect myself, then I probably would; but if somebody had a gun on me, I would probably go ahead and give them all of the money.

Q Now, on the first incident, if you had time to pull it out, would it make any difference whether they were there to buy marijuana or to pawn money, if they then decided to rob you?

A Excuse me?



Q You would use your gun if you thought you had time to use it, is that what you said?

A Yes.

Q Are you making a distinction between people who had come [107] there to buy marijuana and people who had come there to pawn property?

A Yes. What the distinction would be, the people I dealt with were my friends, and I never felt as if I was in danger with them. So, I, in no way, shape or form, carried the gun to protect my guns.

Q So, Mr. Boykin was your friend?

A Well, no – like I said, my brother brought him to me, so I didn't feel any danger from him.

THE COURT: Anything else anybody has?

MR. INGRAM: Very briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. INGRAM:

Q Did you testify earlier in response to a question by Mr. Levin that you had the weapon primarily there as a deterrent?

A Yeah, exactly. Hopefully people would see it and just think, well, we better not try it, that was basically – I really hate to shoot anybody, no matter what the circumstances would be.

Q Now, did you know every person who came into your pawn shop to do business for the pawn shop?

A No, not at all.

Q But you did know the four people you regularly dealt with with [sic] the marijuana business?

A Yes, I did. I have known them ever since I have lived in [108] this state.

Q And several other people that your brother brought to you, you dealt with because they were with your brother, is that correct?

A Yes. Yes, sir.

Q And Agent Boykin was one of those people, is that correct?

A Yes, he was.

Q And you occasionally sold marijuana out of your house, is that correct?

MR. LEVIN: Objection to the leading, Your Honor.

THE COURT: All right. Well, we have been over this territory, I believe.

Go ahead, Mr. Ingram.

BY MR. INGRAM:

Q You sold marijuana other places than in your pawn shop, is that correct?

A Yes, sir.

Q When you picked up marijuana at your sister's boyfriend's house, did you carry a weapon?



A No, I didn't.

Q On those occasions, did you ever see them carrying or holding or possessing a weapon?

A Gertie?

Q Gertie.

A No.

[109] Q That's your sister's boyfriend?

A No.

Q Did any of the person's who have bought from you marijuana, that is the four friends of yours, or any of the two or three people that your brother recommended, did any of them ever wear a weapon –

A No, sir.

Q – when they were buying marijuana from you?

A (Shakes head in the negative.)

MR. INGRAM: Thank you. That's all.

THE COURT: Anything else, Mr. Levin?

MR. LEVIN: No, Your Honor.

EXAMINATION

BY THE COURT:

Q This deterrent, that you said you just had this gun for a deterrent to keep people from stealing your property –

A Yeah.

Q – whatever your property may be –

A Well, yeah.

Q – that would include marijuana?

A Well, I didn't protect it with the gun.

Q Okay.

THE COURT: You may come down. Thank you, sir. Next witness, Mr. Ingram.

(Witness excused.)

MR. INGRAM: Your Honor, the next witness is Todd Crump.

THE COURT: Mr. Crump, please come forward.

TODD ALRIDGE CRUMP,
DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. INGRAM:

Q What is your full name?

A [Todd] Alridge Crump.

Q What is your middle name?

A Alridge.

Q Mr. Crump, where do you live?

A 40418 Mt. Zion Church Road. It's in Norwood, North Carolina.



Q Do you know Joey Harris?

A Yes, sir.

Q How long have you known him?

A Going on five years.

Q Are you currently employed?

A Yes, sir.

Q How are you employed?

A Self-employed.

Q In what kind of business?

A Lawn maintenance.

Q Earlier this year were you employed by another lawn maintenance company?

A Yes, sir.

[111] Q What company was that?

A Carolina Lawn Care.

Q When did you last work for Carolina Lawn Care?

A I would say May of '99.

Q Now, on a particular day when you were working for Carolina Lawn Care, where did you report to work each morning?

A At the BP station about a quarter of a mile from Harris Pawn Shop.

Q Did you drive there and leave your car there?

A Yes, sir.

Q Would your employer then pick you up and take you to the job sites?

A Yes, sir.

Q At the end of the day, did you go back to the BP station to pick up your car?

A Yes, sir.

Q And did you state it was about a quarter of a mile from the Harris Pawn Shop?

A Yes, sir.

Q Have you, on occasion, gone by the pawn shop after work?

A Yes, sir.

Q Approximately how often per week from the beginning of this year through the end of May?

A Three or four times a week.

Q For what reason did you go by there?

[112] A Friends, see what was going on.

Q On those occasions did you observe whether or not Mr. Harris was wearing a firearm?

A Yes, I did.

Q Was he wearing a firearm?

A Yes, sir.



Q Did you ever observe him in the pawn shop when he was not wearing a firearm?

A No, I did not.

Q Have you ever been there at the pawn shop when Mr. Harris closed up the shop at the end of the day?

A Occasionally.

Q Have you occasionally given him rides home after work?

A Yes, sir.

Q What did you observe about what he did with the firearm you saw him wearing when you were there at close-up time?

A He would always lock it up in a drawer.

Q Did you ever see him leave the pawn shop with the firearm?

A No.

Q Showing you what was previously marked as Government's Exhibit 6, does that appear to be the firearm that Mr. Harris was wearing?

A Yes, sir.

Q Or one similar to this, at least?

A Yes, sir.

[113] Q Have you ever bought marijuana from Mr. Harris?

A No, sir.

Q Have you ever visited in his home?

A Occasionally.

Q Have you ever observed any firearms of any kind in his residence?

A No, sir.

MR. INGRAM: Thank you. That's all I have.

THE COURT: Mr. Levin?

MR. LEVIN: No questions, Your Honor.

THE COURT: Thank you. You may come down.

(Witness excused.)

THE COURT: Mr. Ingram?

MR. INGRAM: Your Honor, our next witness is Roger Her. Madam Clerk, he would prefer to be affirmed.

ROGER HER, DEFENDANT'S WITNESS, AFFIRMED

DIRECT EXAMINATION

BY MR. INGRAM:

Q What is your full name, please?

A Roger Her.

Q Your last name is spelled H-E-R?

A Yes, sir.

Q Mr. Her, are you currently employed?

A Yes, sir.



Q How are you employed?

[114] A During the night times I deliver pizza for Dominos.

Q What do you do during the day?

A I'm in the police academy.

Q Where is that police academy?

A In Albemarle.

Q In a community college there?

A Yes, sir, Stanley Tech, BLET.

Q Do you know Joey Harris?

A Yes, sir.

Q How long have you known him?

A I've know him for seven years.

Q Since January of this year, have you had occasion to visit with Mr. Harris in his pawn shop in Albemarle?

A Yes, sir.

Q For what reason?

A He was a friend of mine.

Q When you visited there, was Mr. Harris always present?

A Yes, sir.

Q Did you observe on those occasions whether or not he was wearing a firearm?

A Yes, sir.

Q Was he wearing a firearm?

A Yes, sir.

Q Did you ever observe him not to be wearing a firearm?

A No, sir.

[115] Q Does this appear to be the firearm that you saw him carrying in a holster?

A Yes, sir.

MR. INGRAM: And I am referring to Government's Exhibit 6 here, for the record.

BY MR. INGRAM:

Q Have you ever bought marijuana from Mr. Harris?

A No, sir.

Q Have you ever visited in his home?

A Yes, sir.

Q On those occasions, have you ever seen a firearm of any kind in his residence?

A No, sir.

MR. INGRAM: Thank you. That's all I have.

THE COURT: Mr. Levin?



MR. LEVIN: No questions, Your Honor.

THE COURT: Thank you. You may come down.

(Witness excused.)

MR. INGRAM: Your Honor, our next witness is Mr. Lee McRae.

THE COURT: Mr. McRae.

LEE JAMES McRAE, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. INGRAM:

Q What is your full name, please?

[116] A Lee James McRae.

Q Mr. McRae, are you currently employed?

A Yes.

Q Where?

A East Gate Cinema in Albemarle.

Q Where do you live?

A 145 Goling Drive, Mount Gilead, North Carolina.

Q Do you know Joey Harris?

A Yes, I do.

Q How long have you known him?

A About three years.

Q Have you visited in Mr. Harris' pawn shop in Albemarle on a regular basis since January of this year?

A Yes, I have.

Q On an average, about how many times are you there in the pawn shop visiting per week?

A About 95 percent of the workday.

Q Have you ever been there when Mr. Harris closes the shop?

A Yes, I have.

Q What have you observed – when you have been in the shop, have you observed him to – whether or not he has worn a firearm?

A Yes, he has.

Q And would you describe it, and how he wore it?

A He wore a Tokaev, and he wore it on his belt. He had a [117] holster that went around his belt, and he wore it on his belt.

Q Does this firearm, which was marked as Government's Exhibit 6, appear to be the firearm you have seen him wear on his belt?

A Yes, it does.

Q Have you ever observed him in the pawn shop when he was not wearing a firearm?

A No, I haven't.



Q And you have been in there at closing time?

A Yes.

Q What have you observed him do with the firearm at closing time?

A Take it off his belt, and put the belt and gun, the thing under the showcase, in the drawer and lock it.

Q Have you ever been there at opening time?

A Excuse me?

Q Have you ever been there when he opened the shop?

A Yes, I have.

Q When he arrived to open the shop, was he wearing a firearm?

A No.

Q What did you observe in terms of the opening up procedure and the firearm?

A He unlocked the door, and then he went in and locked the door back after I got in. Then he went over and got his gun, then turned his alarms off, and we got ready to open up.

Q Have you been there on occasion at the end of a workday to [118] give him rides home?

A Yes, I have.

Q Have you ever observed him to carry a firearm from the shop on the way home?

A No, I haven't.

Q You have visited in his home before, is that correct?

A Yes, I have.

Q Have you ever observed a firearm of any kind in his home?

A No.

Q Now, you were in the pawn shop on May the 18th when Mr. Harris was arrested, is that correct?

A Yes, I was.

Q Were you also arrested that day?

A Yes, I was.

Q What were you arrested for?

A Possession with intent to sell and deliver marijuana and Diazepam, and maintaining marijuana and Diazepam.

Q Is that charge still pending in state court?

A Yes, it is.

Q Where was marijuana found that was attributed to you and you were charged with?

A In my car.

Q Was that outside the shop?

A Yes, it was.

Q From whom had you purchased that marijuana that was found in [119] your car on that day?



A Joey Harris.

Q Did you pay him for it when you picked it up from him?

A Yes, I did.

Q So, he did not front it to you?

A No, he didn't.

Q Did he ever – had you ever bought marijuana from him before?

A Yes, I have.

Q Did he ever front the marijuana to you?

A Yes, he did.

Q Sometimes he would front it, sometimes he would not?

A Yeah.

Q Had you ever failed to pay him?

A No, I haven't.

Q Now, on May the 18th, the day you were arrested, where were you and Mr. Harris when he gave you the marijuana and you paid him for it?

A We went to his house.

Q Had you bought marijuana from him at his house before?

A Yes, I had.

Q When you purchased marijuana from him at his home before, have you ever observed him to wear a firearm?

A At his home?

Q Yes.

[120] A No.

Q When you have purchased marijuana from him anywhere, have you ever worn a firearm?

A No.

MR. INGRAM: Thank you. That's all I have.

THE COURT: Mr. Levin?

MR. LEVIN: Briefly, Your Honor.

CROSS EXAMINATION

BY MR. LEVIN:

Q Mr. McRae, I wasn't sure you paused or not. Has there ever been a time when you observed the defendant selling or buying marijuana when he was wearing a firearm?

A Selling or buying marijuana, when he had a firearm on?

Q Yes.

A No.

Q Well, were you in his shop on April 30th, 1999, when Special Agent Boykin purchased marijuana from Defendant Harris?

A I can't remember if I was there that date or not.

Q Have you ever seen Special Agent Boykin?



A Yes, I have.

Q Where have you seen him?

A In the pawn shop.

Q Do you recall a time when the defendant went behind the pawn shop to sell marijuana?

A No, I didn't.

[121] Q Is there – did you ever loan him the keys to your car?

A Yes, I did.

MR. LEVIN: I have no further questions, Your Honor.

EXAMINATION

BY THE COURT:

Q Is it your testimony that Mr. Harris did not sell marijuana at the shop, as far as you know?

A No, that's not my testimony.

Q Well, is your testimony that he did sell it at his shop?

A Yes, he did.

Q How many times did you see him sell it?

A I don't know. I would say occasionally once a month, bi-weekly, maybe.

Q Who did he sell it to?

A Um, saw Rodney Deaton, his half brother, come in there, and this guy named Garland Pucket come by, and myself, and Agent Boykin.

Q So, you did know that he sold it to Agent Boykin?

A Yeah, after he told me.

Q When he came back in?

A No, I don't recall being there that day. I think I was gone with my girlfriend.

Q When did he tell you that he had sold to Agent Boykin?

A The next day.

Q What did he tell you?

[122] A Well, I mean, that was just something that, I mean, we didn't talk about.

Q You said he did tell you about it. I'm asking you what he said.

A He said agent – well, he didn't say Agent Boykin, but he said that a guy that my brother introduced me to said I sold him – I think an ounce.

Q Are you telling the Court that you didn't see much marijuana sold at that place?

A Maybe bi-weekly and monthly, because most –



Q Why did you hang around there so much?

A Play video games.

Q Pardon?

A Play video games.

Q And anything else?

A Occasionally get high with Mr. Harris.

Q And was that pretty often?

A Probably 50 percent of the time.

Q 50 percent of the time. And you were there everyday?

A Yes.

Q Do you believe your memory is affected by marijuana?

A Short term or long term?

Q Either one.

A I have heard my doctor tell me. I'm not really sure.

Q I'm asking you what you believe.

[123] A I would say maybe a little.

Q How old are you?

A 21.

Q Still using marijuana?

A No, sir.

Q When did you quit?

A The day I got busted, May 18.

Q Haven't used any since then?

A No, I have not.

Q All right.

THE COURT: You may come down.

Mr. Ingram?

MR. INGRAM: Our last witness, Your Honor, is Mr. Patrick Massaroni.

THE COURT: Mr. Massaroni, please come around and be sworn.

PATRICK MASSARONI,
DEFENDANT'S WITNESS, SWORN
DIRECT EXAMINATION

BY MR. INGRAM:

Q State your full name, please.

A Pat Massaroni.

Q Mr. Massaroni, how are you employed?



A I am currently employed as an investigator with the Federal Public Defender's office.

Q Were you assigned to Mr. Harris' case to assist in [124] preparation for trial?

A Yes, sir.

Q In September and October of this year, as part of your investigation did you visit various pawn shops in Albemarle and the Asheboro areas?

A Yes, sir.

Q Let me show you what I have marked as Defendant's Exhibit Number 3. Can you tell Your Honor what that is?

A This is a list of the pawn shops that I visited in September and October of this year.

Q And is this chart I have here next to me at the table an enlargement of that exhibit?

A Yes, sir.

Q For what purpose did you visit each of these pawn shops?

A The purpose is to talk to the people in each one of the pawn shops to see if they were wearing any type of weapons while they were working in the pawn shop, and whether they could be seen or were they concealed.

Q Did you visit each of these pawn shops during daytime working hours on a weekday?

A Yes, sir.

Q And did you meet and talk with either the owner or the employee who was on duty at that time in each pawn shop?

A Yes, sir.

Q Looking at the first one on the list, J.R. Gun Shop in [125] Albemarle, did you meet or talk with the owner or manager that day?

A Yes, sir.

Q Did you observe whether or not that person was wearing a firearm?

A Yes, sir, he was.

Q To cut this a little shorter, did you observe in each of these pawn shops whether or not the person on duty, the manager, employee on duty was wearing a firearm?

A Yes, sir.

Q And were there any of these pawn shops where the person in charge was not wearing a firearm?

A The only one was Top Dollar Jewelry in Albemarle, and he said that –

MR. LEVIN: Objection.

THE WITNESS: – that he had guns –

MR. LEVIN: Objection.

THE WITNESS: Sorry.

THE COURT: I think that is not admissible, but I'm going to allow that in. Go ahead and answer.



THE WITNESS: I'm sorry, Your Honor.

THE COURT: Go ahead. Answer the question.

THE WITNESS: Top Dollar was the only one, and they had weapons close by where they could get hold of.

BY MR. INGRAM:

[126] Q And in how many locations?

A He had them in three locations.

Q And approximately how large was that pawn shop?

A That was a – that's a pretty large pawn shop. It is a little bit larger than this courtroom.

Q Before you were employed as an investigator with the Federal Public Defender's office, how had you been previously employed?

Previously employed with the Greensboro Police Department.

Q For how many years?

A 26 years.

Q During that tenure as a police officer in Greensboro, did you have occasion to visit pawn shops in Greensboro?

A Yes, sir.

Q In your official duties as a police officer, what was your purpose in visiting pawn shops?

A We would go to – Detective Eli Welch, one of the officers/detectives at that time, and myself, would go to different pawn shops to pick up the pawn tickets to examine to see if the property was stolen, and we would check it out. Then occasionally I would also go in to look for merchandise that were stolen on my cases.

Q On those occasions while you were a police officer, when you visited pawn shops in Greensboro did you observe whether or not the owner or person in charge was wearing a firearm?

A Yes, sir.

[127] Q Were they?

A Yes, sir.

Q Did you ever visit in a pawn shop during that time, in one of the pawn shops in Greensboro, when the owner or person in charge was not wearing a firearm?

A At that time, I believe we only had two that I worked, and one of them was on South Elm Street in Greensboro, and the other one was out in the High Point area, and both of them wore guns at that time.

THE COURT: Was the one on South Elm Street B & W?

THE WITNESS: I believe you're right, Your Honor.

THE COURT: Okay.

THE WITNESS: The other one, I don't recall what the name of it was.



BY MR. INGRAM:

Q And in the pawn shops in Greensboro that you visited while as a police officer, and in the ones you visited recently that are listed in Exhibit 3, were some of them wearing firearms that were similar to the firearm in Government's Exhibit 6?

A Yes, sir. Some of them would look like that, and some worse than that.

Q What do you mean by some "worse"?

THE COURT: "Worse," meaning bigger, more dangerous?

THE WITNESS: Larger, more dangerous than what you have got there.

[128] BY MR. INGRAM:

Q Just what kind of weapons were those?

A There was a pawn shop on Spring Garden Street, I can't recall the name of it, that I visited quite often. And we would go in there, and he would have a .357 magnum, and tomorrow a .38, then one day he was carrying a .44. And I told him he needed training wheels for that thing, that was a 10-foot – I don't know, a 10, 12-inch barrel, but he would just wear different types.

Q Typically, what kind of merchandise have you observed for sale in pawn shops?

A All of them had guns that I visited, and you would see TVs, radios; just all types of things you could think of in the pawn shop.

Q Had you been in these pawn shops and observed scales?

A Yes, sir.

Q How frequent was it that you would see scales in a pawn shop?

A Quite frequently. A lot of them would have the digital-type scales. They would have the criminal justice scales which were two – the old cooking scales. You would see a lot of those type of scales in a lot of pawn shops.

Q Thank you.

MR. INGRAM: That's all I have.

THE COURT: Mr. Levin?

[129] MR. LEVIN: Briefly. Thank you, Your Honor.

CROSS EXAMINATION

BY MR. LEVIN:

Q Mr. Massaroni, when you observed the weapons in these pawn shops, J&R Gun Shop, you didn't observe any marijuana, did you?

A No, sir.

Q Did you observe scales?

A Did I observe scales? I believe I saw some in the one in Troy had some scales, but I wasn't there actually looking. I was just glancing around looking at the stuff. I



believe that's where it was, but I'm not positive, Mr. Levin.

Q You were a former police officer?

A Yes, sir.

Q In your experience as a police officer, do you recognize that scales could be used as tools of the drug trade?

A Yes, sir.

Q And they're also used in the pawn shop industry?

A Yes, sir.

Q As a former – when you were a police officer, were you aware that guns could be used as tools of the drug trade?

A Yes, sir.

Q Apparently, guns are also used in the pawn shop business?

A Yes, sir.

MR. LEVIN: I have no further questions, Your Honor.

EXAMINATION

[130] BY THE COURT:

Q Mr. Massaroni, back to the B & W Pawn Shop. Do you recognize the name of Wayne Nixon as being part of the B & W Pawn Shop down on South Elm?

A I believe so, but I'm not positive, Your Honor.

Q Based on any vague recollection or memory, do you recall whether or not Mr. Nixon wore a weapon?

A He didn't, but I believe one of his – is he a little gray-headed guy?

Q No, he is the tall man.

A There is a little gray-headed guy, he didn't wear, but there was another guy that did wear.

THE COURT: I think the record ought to show that at one time I represented B & W Pawn Shop and Wayne Nixon in a lawsuit, and as a result of that I did get to know that those people – though I'm not sure it was Wayne Nixon – in his shop did wear weapons during the time that they were working. If that makes any difference to anybody, I will be glad to hear from you. I am aware of that, outside this case. That's the reason I was asking Mr. Massaroni, to see if we could bring it out that way.

Someone did wear a gun in the shop. All right. Thank you.

MR. INGRAM: Your Honor, that concludes our evidence.

(Witness excused.)

THE COURT: All right. Mr. Levin, do you have any [131] additional evidence?

MR. LEVIN: If I may have a moment, Your Honor. Nothing, Your Honor.

THE COURT: Mr. Ingram, I'm going to hand you a form here. If you and your client would look at it. I



was afraid my memory was playing tricks on me, but it has been found. All right.

Mr. Harris, you're still under oath.

You wish me to sign and approve this jury waiver, is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. I have done it.

Gentlemen, I will hear from you. It occurs that you may wish to be heard.

I think, Mr. Levin, that in the course of things you're required to speak first, so I would say everything you want to in the beginning, because I will decide whether to give you closing on that or not.

MR. LEVIN: Thank you, Your Honor.

THE COURT: All right.

MR. LEVIN: Your Honor, I am used to speaking my mind, so with that said, if I may pull this out.

Your Honor, it is undisputed that on April 30th, in Stanly County, the defendant sold 114 grams of marijuana to Special Agent Boykin.

[132] It is undisputed that during the commission of that drug trafficking offense the defendant carried a fire-arm, specifically the nine millimeter Taurus pistol. That serial number is reflected in the stipulation, which Your Honor has before you.

The only issue coming into court today was whether or not that weapon was used in relation to the drug

trafficking offense; that is, did the weapon have some purpose or effect with respect to the drug trafficking offense. And was its presence more than the result of an accident or coincidence.

Your Honor, we know that in this case the presence of the gun was not sheer happenstance. On the contrary, the defendant admits that he carried the gun to deter would-be robbers from stealing his property. His property, as he defined, was the pawn shop's property, as well as the marijuana.

Your Honor, the mere fact that the defendant was carrying his weapon while protecting his pawn shop property is really of no import. The fact that it served as a dual purpose, the carrying of that weapon, is really not relevant.

The same as the scales, Your Honor. Those scales had two purposes: To weigh jewelry, and to weigh marijuana. The business, the store served a dual purpose: To sell the pawn shop property, and also the defendant sold marijuana from that store.

The weapon served two purposes: To deter would-be [133] robbers from stealing pawn shop property, as well as the marijuana, as well as the cash from the cash register, which contained commingled funds.

The defendant – it might be a closer case, Your Honor, if we were still inside the pawn shop. But on April 30th, the defendant conducted his transaction outside the pawn shop, in a vehicle, in a vehicle which the defendant positioned so that he could see oncoming traffic. He is



wearing his weapon. He still admittedly does not trust Agent Boykin.

So, he left the pawn shop, goes into the vehicle, and he is wearing his weapon, a weapon which increases the likelihood of the success of his drug transaction. And that's all that is required, Your Honor, in order to find in relation to.

Your Honor, the conversation, you heard evidence regarding a conversation about the bullets, the rounds in the weapon being able to penetrate the vest of a police officer. Those comments, Your Honor, set the mood. They send a message.

Number one, he is willing to protect himself against the police. And another inference that can clearly be drawn from that is, if he is willing to use it certainly he is willing to use it against law enforcement, certainly he is willing to use it against criminal elements who might try to steal his marijuana.

Your Honor, clearly the evidence shows beyond a reasonable doubt that defendant carried his firearm during and in relation to the sale of marijuana. Thank you.

[134] THE COURT: Thank you, Mr. Levin.

Mr. Ingram?

MR. INGRAM: Your Honor, the Supreme Court has noted that the in relation to language is there to clarify that a firearm must have some purpose or effect with respect to the drug trafficking crime, and not simply because its presence is the result of accident or coincidence. And specifically, that language was added to allay the concern that a person could be punished under 924(c)

for carrying a firearm when – while in possession of that firearm during a drug trafficking transaction, even though the presence is coincidental or unrelated to the crime.

So, there is a contemplation that – that some set of circumstances exists where a defendant can carry a firearm, during a drug transaction, but the circumstances would illustrate that that was – that the firearm was not carried in relation to.

Obviously, if Congress had wanted to punish simply carrying of a firearm during a drug transaction, they would have left it at that and not put the in relation to language in there.

Mr. Levin states that the scales had two purposes, and therefore the firearm must have had two purposes, also. But the scales are different. The scales, Mr. Harris admits that he used it for both purposes. He weighed gold, he weighed jewelry, [135] he also weighed the marijuana on it. So, he has admitted those have a dual purpose. He has not admitted that the firearm had a dual purpose.

The store, Mr. Levin says, was there for two purposes: It was there to sell his legitimate merchandise, and also to sell marijuana.

Well, that's true. Mr. Harris has admitted that, although he also admitted that he sold marijuana elsewhere. If he had been charged, if we were talking about a charge here, for example, under state law of maintaining a place for the purpose of selling drugs, then certainly his admission that he used – he sold marijuana out of the



store, as well as his legitimate merchandise, would have some relevance. So, the fact that the scales and the store have a dual purpose do not necessarily mean that the firearm also had a dual purpose.

I have tried to come up with some example that I can think of, other than this one, where someone might carry a firearm in relation to a drug trafficking crime, but not be said to have carried that firearm in relation to a drug trafficking crime.

And the two examples I can think of, if a police officer, during his regular business on patrol, carrying a firearm, were to stop by a friend's house and buy or sell some marijuana, then he certainly would be carrying the firearm during the drug transaction. But I think the Court could find under those [136] circumstances that he was not wearing it in relation to the drug crime, because the reason he is wearing it is because he is required to as a police officer.

Perhaps a night watchman who wears a firearm, likewise, might sell some marijuana to some friends who came to the premises, but could be found not to have worn the firearm in relation to the drug crime if he was required to wear it otherwise. And I know it's a fine line to draw. The evidence here is that it's virtually a standard in the pawn shop industry that people wear a firearm for protection in the firearm business.

Just as Mr. Harris testified, it's there for a deterrent. You hope you never have to use it; and that's why you wear it, for a deterrent purpose. He is selling other firearms. He is selling jewelry. He is selling appliances. He has 2 to $4,000 in cash at any one time. And some of the

people who are coming in there to pawn merchandise are very likely criminals, who have very likely stolen that merchandise. That's why, as Mr. Massaroni testified, police officers go and check the pawn tickets, and why they go and check the merchandise periodically, to see if it is stolen.

So, not only the nature of the business itself, by the nature of the merchandise that is there, and the fact that there is a lot of cash on hand, attracts attempted robbers. In fact, acknowledged robbers, if they were to be asked and told the [137] truth, are sometimes coming in there pawning merchandise that they have in fact stolen. So, it's obvious why people in pawn shops do wear firearms. And Mr. Harris testified that his father had been involved in running a pawn shop in the past, and had advised him about the type of security he needed, and that he needed to wear a firearm.

The Government introduced. a photograph made from the videotape where you do not see Mr. Harris wearing a firearm on his hip in a holster like the firearm here that is Government's Exhibit Number 6. But he explained that, that when he first opened his pawn shop business he carried another firearm that he did not have a holster for, and he carried it in the back of his belt.

And we introduced photos that showed his friend in December and January of last year wearing this very firearm, Government's Exhibit Number 6, in the shop. And Mr. Harris explained that the photo of him that appears to illustrate he is not wearing a firearm, that is an inaccurate portrayal. In fact, he had the other firearm in his pants at the time.



And his testimony was that Mr. – the other fellow he knew by the name of Scarecrow, who did have that firearm on him in the photograph, then gave him that firearm for a Christmas present, and he began to wear that in the holster, and that's exactly what Agent Boykin saw when he went in. That's exactly what all of these other people who testified saw every time he [138] was there.

THE COURT: For purposes of any decision in this case, Mr. Ingram, the Court will find that during and in the course of the defendant's business he did, in fact, carry a weapon.

MR. INGRAM: Thank you, Your Honor.

Then I would finally want to make a couple of distinctions to suggest why the Court should conclude that he did not wear this firearm for a dual purpose, given the fact that Your Honor has indicated that he would accept the fact that he wore it at least for protection in the pawn shop business.

Well, one is he sold marijuana other places and did not wear a firearm. By his own testimony, by the testimony of one witness, he bought and sold it at – either bought or sold it at his sister's boyfriend's house, and bought and/or sold it out of his own home. It would seem to me there would be a much greater need for security in a location like those, than there would be in a public, open-for-business pawn shop in the middle of a working day.

But the testimony was that he never had a firearm at home or at the sister's boyfriend's house, and no one

wore a firearm either. Nobody came there wearing a firearm.

Your Honor, I think that's important, especially relevant to the questions Your Honor asked Mr. Harris about if you were wearing a firearm to protect your merchandise in the store, weren't you also wearing it to protect the marijuana? What if, [139] for example, one of your customers refused to pay or took your marijuana?

And, of course, it's Your Honor's decision to interpret and understand in your own way what Mr. Harris was trying to explain. But it seems to me, the distinction he was trying to make when he answered Your Honor, that the reason I would not have used the firearm if one of my customers had refused to pay is because they were my friends.

And then, Your Honor would ask why would you not use it, because they were your friends? And I think the answer he was giving was because they were my friends. I would not have used a firearm around my friends. These were not – I think there is a danger that this could be viewed in the – viewed in the abstract as some sort of drug operation where people are buying and selling drugs in the most nefarious kind of stereotypical way that the public views drug transactions.

What we have here is a guy who had three or four friends, half brother. He would buy some marijuana, and essentially buy for them also. They would then come by and buy from him or pay him, or he would front to them and they would get their share of it.



It was a group of friends that bought and sold marijuana together. And, as Mr. McRae said, probably got high together. This was not a clandestine crack house or a street gang where everybody comes armed to the teeth because there may very well [140] be violence, or there may be tens of thousands, if not hundreds of thousands of dollars passing hands there, and kilos of crack or heroin or cocaine passing hands.

This was – without minimizing the significance of the marijuana problem in this country, this was just marijuana. This was a drug that came about as close to – we have had since Prohibition, to having any drug legalized back in the '70s.

This simply was not a cocaine, crack, heroin-type situation. These were people who were buying and selling marijuana in amounts where $360 passed hands, not $25,000 or a hundred thousand dollars.

I think his answer to Your Honor's question, about why would you not have used your firearm if some of your customers had not paid you, was exactly what he meant to say, that is, because they were my friends.

I think the Government certainly has proved that Mr. Harris has admitted that he carried that firearm during the drug transaction. He hasn't denied any fact here that the Government has put into evidence. He simply denies the inference that he wore that firearm because – even partly because he sold some marijuana out of his shop, as well as selling marijuana other places. People came and picked it up in other places.

THE COURT: Tell me, Mr. Ingram, what you make of the statement that he makes when he talks about having that gun, this gun and the bullets that we have made here makes it capable [141] for the bullet to penetrate not only the bulletproof vest, but penetrate the heart of a policeman? To which he responds during trial, I don't know why I said that.

What do you make of that, if anything?

MR. INGRAM: I don't make much of it. But I want to characterize it the way I think it should be characterized, and the way the discussion actually took place, and that is, admittedly, the tape we heard here today was a little bit clearer than the copy of the tape that I had heard.

THE COURT: I see.

MR. INGRAM: I still did not hear, and maybe Your Honor did, I still did not hear anything about penetrating the heart, penetrating the body armor. I did hear him say this could F-up a cop.

THE COURT: I thought I heard something about penetrating the bulletproof vest. But I, too, did not really catch from that. But there has been, of course, no denial that that happened, because Mr. Boykin was really not cross examined, nor was there a contradictory evidence put. He said I said it, at least Mr. Harris did.



MR. INGRAM: Your Honor, had he only said referring to this ammunition, this could F-up a cop, I think the clear implication could mean a cop standing there without armor is no different than a fireman standing there without armor, or a lawyer standing there without armor. I think the clear [142] indication would be this is powerful enough to penetrate body armor.

So, I think –

THE COURT: I have a hard time with that one. My own thought processes run a little differently from that, in that if the gun was to protect him in case of violence from the mean group of people who pawn things, he would have at least said in the vernacular of this will stop anybody who steals money from me or tries to rough me up when I am here in this pawn shop.

MR. INGRAM: Your Honor, they are talking about firearms. As far as Mr. Harris knows, these are guys who are talking about – there is a Baretta mentioned. He said no, this is a Taurus. He has firearms there. And I think, fairly, that conversation should be characterized as sort of macho talk about firearms.

Hey, I have got ammunition in here that could – even how powerful is it. Well, they're homemade bullets, and they can penetrate body armor. That's all that was.

THE COURT: I just thought it was sort of significant. I can understand the argument that you're making that your client said, and this goes to his credibility. I don't know why I said that.

MR. INGRAM: And I think he is being honest. He's there. I mean, there is no reason for – I would have a hard time coming up with a reason. I don't know why I said that. I was [143] bragging; I was boasting about the power of the ammunition, is the only reason you could say.

There is no real reason why he said that. I think it would be an erroneous conclusion to conclude that by that he meant if ever a cop comes in while I am selling marijuana, I can kill a cop.

THE COURT: May be, but that's what he said, that this will penetrate a cop's armor and go through his heart. And in conjunction with the situation that was going on at that time, that is an illegal transaction. It makes it difficult for me to convert that to a legal transaction.

MR. INGRAM: Well, Your Honor has already indicated that you accept the fact that he was wearing the firearm at least in part for protection.

THE COURT: I do. I certainly do.

MR. INGRAM: I think in recalling the context in which that one comment was made, that is a 45-minute tape, and much of that was conversation about something other than the drug transaction.

THE COURT: I assume that's correct –

MR. INGRAM: Then I think that it is just as fair a characterization to say this was boasting about the power – I don't know what else. I don't know about guns, so I don't know what else you could compare the power



of a particular type of gun or ammunition. This could go through a six-inch piece of [144] wood, but it seems to me that whether or not a particular type of ammunition can penetrate body armor is the – in the lingo of the guys who like guns and talk about guns, that would be a way to explain or to boast about the power of the ammunition.

THE COURT: That may be. When you add through an officer's heart, that adds a new dimension to it that is not present before, whatever you make of it. I understand.

MR. INGRAM: Your Honor, I would suggest that the totality of the evidence here about the pawn shop operation, the photos that you see, the fact that his friends hang out there, the fact that police officers are regularly in there to check for the various reason Mr. Massaroni testified that he went to pawn shops as a police officer, to pick up the pawn tickets.., to check those against recent thefts, and to check the merchandise against known stolen merchandise, the fact he has police officers coming and going on a regular basis, knowing them on a first-name basis, I think suggests that the characterization I'm giving of that conversation is a fairer characterization of that.

THE COURT: Let me ask you a speculative question, Mr. Ingram. Suppose the evidence in this case is exactly like it is, except that when things started out this was a 100 percent pawn shop operation. But at the time on April the 30th, 1999, it turns out from valid evidence that the operation is 25 percent pawn and 75 percent marijuana. Does your argument still [145] stand that because this was a pawn shop operation, and people do

carry guns in the operation of that, that even though drug transactions thereafter were going on, it is not in relation to those drug transactions that the gun was carried?

Would that be a fair argument?

MR. INGRAM: Your Honor, I think there are several factual variables there.

THE COURT: Okay.

MR. INGRAM: One, if the evidence shows that it was a 25 percent pawn shop operation, 75 percent drug operation, and the drugs that were being sold were 100 grams or so at a time for $360, then I think it may not be a fair characterization to say that the firearm carried was in relation to a drug transaction.

THE COURT: Then do we look at it on the basis of profits as opposed to time involved?

MR. INGRAM: Let me give you one other factual –

THE COURT: All right.

MR. INGRAM: I think the – if the evidence shows that the pawn shop was purely a front, that he stuck some TVs and firearms in there and a cash register, but really all he did was sell marijuana there, then I think certainly that is the extreme example.

THE COURT: We both agree on that. I bet Mr. Levin would agree on that, too. But when you back off from that, where do you stop? If its 25 percent legitimate, 75 percent [146] illegitimate, if it's five percent legitimate and 25 percent illegitimate, what's the line that we draw on wearing and in relation to a drug offense?



MR. INGRAM: I'm not sure where you would draw an automatic line, but I don't think that's the only thing that the Court should consider. I think the Court should consider first of all, as the Court has, that pawn shop owners carry firearms for protection purposes.

THE COURT: Right.

MR. INGRAM: Secondly, I think the Court should consider the evidence, and there is nothing here that the Government has presented to the contrary, that Mr. Harris earned a living out of this pawn shop. And he made no money off of the marijuana, except to pay for his own use. He basically sold enough to pay for his own. And so, he was not making a big profit out of the marijuana business. So, I think the example in terms of the profit motive or the profit relationship in this case is really at the other end of the spectrum from the front.

THE COURT: Could be. I don't really have any evidence of that before me, do I? I don't have any idea what he was making out of his pawn shop.

MR. INGRAM: Except his testimony that he was earning a living by doing it, and he was not making any money off the marijuana except to pay for what he used for himself.

THE COURT: Okay.

[147] MR. INGRAM: That, to me, is a hundred percent versus a zero percent. I think, in addition to that, I think Your Honor should consider that this was marijuana, and this was marijuana being sold to his friends and to people that his brother brought to him. A relatively small group of four friends. And I think by the time

we add in Agent Boykin, there were maybe three others, maybe including Agent Boykin, that his brother brought to him and said they want to buy a little bit. When I say a little bit, that is pretty much what Mr. – Agent Boykin was buying, 114 grams, $360. This much, as you saw in the exhibit.

I think the type of drug, compared to heroin, cocaine, crack, and the relative small amount of the drug that was sold, and the nature of the group that was involved, that is, virtually his friends and acquaintances of his family, and a relatively small number at that, all suggest that this was not a drug – a stereotypical drug operation that required the use of a firearm for protection.

I know that there are some people, probably some courts, that would say if you sell any kind of drug, any time, and there is a firearm there, then there must have been some potential for its use.

Well, if you can leap to that conclusion in every case, then we might as well take out the in relation to element of the crime, because if it's possessed or carried during, that's all that would be required, if you assume that a firearm being [148] present could always further the likelihood of success of the crime.

I think, obviously, there is the Supreme Court, and in my request for jury instructions, back when we were thinking of a jury trial, I cited the Supreme Court case and two Fourth Circuit cases that acknowledged there must be some circumstances where the presence of a firearm is either a coincidence and is unrelated to the drug transaction, even though it is there. I submit that this is one of those cases. And I think it was just a



coincidence. He was wearing it for his protection. There is no indication he would ever need to use it for protection of the marijuana business.

He testifies, believably, he would never have used it in that context because he was dealing with his friends and people who were introduced to him by his brother. I think if there is ever a circumstance where the firearm's presence is a coincidence, then I think short of the example I give about a police officer or security guard, that this is equally as compelling for the Court to draw that conclusion.

THE COURT: Actually, Mr. Ingram, I am sort of convinced that the example that you gave may still be a factual dispute as to whether that case was used during and in relation to a drug trafficking offense.

I guess I have would have to take it one step further. It is not my business to give examples of what isn't a [149] violation, but I would assume that if an officer were walking along the street fully armed, and looked down and found a package which was marijuana, and he goes home and puts it in the mail to his brother in California, and says send me $1,000 for this, I would assume that his weapon would not have been used in connection with and in relation to a drug trafficking offense.

But if he walks up to a door with his gun showing, and says you sell me marijuana, then I think there might be a factual basis to say it was during and in relation to the drug purchasing offense.

MR. INGRAM: I agree with Your Honor on those facts. Where I would draw a distinction with the

police officer, and would liken it to this situation, if a police officer on his routine patrol wearing his firearm stops and goes up to a crack house where crack is being sold 24 hours a day, and goes in, doesn't know these people except as drug dealers, that's the only relationship he has to them, they have weapons there, also, he buys a quantity of crack cocaine. I think in those circumstances it would be difficult to argue the firearm did not have a dual purpose.

But if that police officer has known a guy for seven years, and hangs out with him, and knows him well, that's his friend, and he stops by that guy's house, and goes up and knocks on the door and says, do you have my marijuana that you're going to buy for me? And the guy says, yeah, I picked it up this [150] afternoon, here it is. You have got the money, here it is. I would say that's not in relation to.

I think that's exactly what we have here: People dealing with friends over marijuana on a regular basis, where there was no anticipation of any need for any firearm. Importantly, Mr. McRae testified that he never carried a firearm when he bought from him.

THE COURT: Unfortunately, I think Mr. McRae really enjoys marijuana.

MR. INGRAM: I think that was true.

THE COURT: That's his business.

MR. INGRAM: And this is sort of beside the point and not in evidence: I think his testimony that he has not been using marijuana is probably because he has got a pending charge and is having to be tested.



THE COURT: It's just sad to see something like that, it really is. All right.

MR. INGRAM: I may have beat my horse to death by now. And so, unless Your Honor has any other questions, I think I have made the points I feel I need to make.

THE COURT: Thank you, Mr. Ingram.

Gentlemen, I think the facts are pretty clear. It is the inferences to be drawn from the facts. And I really don't have any problem finding in my own mind that from this evidence, and from life in general, that pawn shop operators probably are [151] going to carry about their person some type of weapons. I have seen it in pawn shops. And my guess is, there are times I didn't see it that it was there.

But from this evidence, I don't have any problem finding that Mr. Harris ordinarily carried, and generally and specifically carried a firearm during the course of his pawn shop operation.

The problem I have with Mr. Harris' position is that this was not singularly a pawn shop operation. It is a sale of an illegal drug that took place, and Mr. Harris himself says that his gun was to protect his property, and it was for show. He didn't use that word, but essentially that was what he used when he said he hoped it would make people think before trying anything.

And I simply am unable to draw the distinction that if it is for a legitimate purpose, it cannot be for an illegitimate purpose. I think there are cases in which that might be argued, but in my opinion the facts of this case

show that this man was willing to sell marijuana. He did sell marijuana at his place of business, in and outside the place of business.

He had a gun. He had it for show, and it was a comfort to him, whether he was engaged in legitimate or illegitimate business at any time; and therefore, I don't have any problems finding from this evidence that Mr. Harris carried a firearm on April the 30th, 1999, during and in relation to a drug [152] trafficking offense. Therefore, on Count 2, the Court would find that Mr. Harris is guilty as charged in Count 2.

Now, sentencing in this case will take place – by the way, I need now to go back to Count 1.

There is a stipulation that he was selling, or did sell the marijuana, but is there any reason we can't use that stipulation or agreement on the basis for a plea on Count 1, Mr. Ingram?

MR. INGRAM: No, Your Honor.

THE COURT: The Court finds that upon agreement of the parties to the facts that have been introduced in this case, that Mr. Harris, by his own admission, is guilty of the charges contained in Count 1. The Court has heard the facts, and finds there is a basis in fact for the acceptance of the plea to Count 1, and therefore Mr. Harris is guilty as charged in Count 1. And the Court's finding in lieu of the jury verdict, a finding of guilty on Count 2, the Court finds the verdict of guilty there.

In this case, sentencing will take place on February the 1st, 2,000 [sic], 9:30 a.m., in Greensboro, in Courtroom Number 1.



Now, Mr. Ingram, what say you to custody?

MR. INGRAM: Your Honor, under the bond statute, this is not a case that whereupon a finding of guilt the Court must take Mr. Harris into custody, because this is a maximum five-year penalty, and the statute says that if there is a conviction of a [153] drug offense carrying a maximum ten-year sentence or more, the Court must take the defendant into custody.

He has been out on bond from the inception in this case. And I checked yesterday with Elaine Rector in Pre-Trial Services, who is his Pre-Trial Services officer here, although he has been directly supervised by a Pre-Trial Services officer in Charlotte because of the proximity of his residence to the Charlotte area. I inquired of her to see if there had been any problem with his pretrial release. She said she did not know of any, but I took the opportunity to call Charlotte, and called me back, and indicated that no, there had been no problem with his pretrial release to date, and he has reported as he is required.

He has done everything that has been required of him, including taking urinalysis testing, which has proved negative. He has reported every time that he is supposed to be in court, and every time that he is supposed to meet with me.

So, I don't think there is any question that he will appear as ordered for sentencing. He will cooperate with the probation office in meeting with them to prepare a presentence report, and he will be no danger to the community. He has not used marijuana since his arrest, has not sold marijuana, has nothing to do with it now. He is working in the landscaping business now, temporarily.

THE COURT: The place is closed?

MR. INGRAM: Yes, sir.

[154] THE COURT: Okay. Is he hanging out with any of these people like Mr. McRae?

MR. INGRAM: I know they have come with him to meet with me. I can't say that? If Your Honor –

THE COURT: It seems to me like those people ought to be separated. First let me hear what Mr. Levin has to say, Mr. Ingram.

MR. LEVIN: Your Honor, the Government's position is that the defendant should go to jail today. He is facing a significant amount of time.

THE COURT: Is it because you think he is required to do that, or is it discretionary with the Court?

MR. LEVIN: Actually, Your Honor, I did not look into it.

THE COURT: I think if it is a crime of more than ten years it is mandatory. If you want to check on that, I will certainly give you time to do it. But it is my belief that it is not a mandatory matter for the Court, it is discretionary. We can look at it and see, if you want to.

MR. INGRAM: I can show you that.

MR. LEVIN: I understand the Court has discretion in this matter. The Government's position is the same, for the reasons that he is still facing a significant amount of time, and it is an offense involving a firearm.

THE COURT: Do you have any knowledge or speculation or information that he is likely to flee or is



likely to cause a [155] danger to anyone in the community, Mr. Levin?

MR. LEVIN: If I may have a moment, Your Honor.

THE COURT: Yes, sir, you may.

MR. LEVIN: Your Honor, I just bring to the Court's attention, apparently threats have been made against the defendant's half brother relating to this case. I cannot – I'm not in a position to identify who made those threats.

THE COURT: All right.

MR. LEVIN: That's all we have, Your Honor.

THE COURT: Thank you, Mr. Levin.

Mr. Ingram, have your client stand, please.

Mr. Harris, I hope you can understand the seriousness of the matter here, and I expect you do. But this is a matter in which the Court has complete discretion whether you go home or don't go home today. And it's a real debate as to what to do here.

It appears that there have been some threats made to your half brother, against whom I assume that you hold some rather hard feelings. And it would be hard to convince me that you don't hold hard feelings against someone who had inadvertently or intentionally set you up.

Therefore, when these rumors circulate and fly, naturally the one that it must come down to and point towards, whether accurately or inaccurately, is you. So,

you have to bear the brunt of that, whether you have anything to do with it or not.

[156] You have, according to Mr. Ingram, met every meeting that you were supposed to have with him. You have been here and you have tried to be here on time. And by the way, this morning's events of not being here on time are not being held against you at all. It is my understanding, and I appreciate the candor of Mr. Ingram in telling the Court that he misdirected you on where to be here today, and so the Court is finding no fault on your part at all now.

But both of these are serious matters. My guess is that you and Mr. McRae and a few others probably think that marijuana is such a mild thing that you don't understand why people get upset about it. My only response to that is that I don't think you understand the gravity of the situation if you feel that way; and secondly, it is still a violation of the law, and you have no right to pick and choose what laws that you will obey.

If you get caught disobeying the law, then you're going to have to suffer the consequences, which are not light, even at best. All of which is to say that this Court considers the matter close, a close call, but is going to allow you to remain at liberty, assuming that the rumors of threats to anyone, including a brother-in-law, arising out of this matter, cease and desist.

You may ask how you can have any part in that in making them cease and desist if you are not having any part in doing them already. And my only response to that, that's your burden, [157] not the Court's, because



you're in the position that the guilt or apparent guilt falls on you and no one else.

So, you may be subject to be brought in at any time and your bond revoked, even on something that you don't do, unless these rumors stop about the brother-in-law.

Outside of that, the Court is going to allow you to remain at liberty. I am concerned about the people with whom you have consorted in the past, because I think at least one or more of them are friends in marijuana, and probably friends in what you think is fun and enjoyable, but you're going to have to cease and desist while you're at liberty. You probably already have, because your urinalysis testing has shown negative to this point.

I'm going to ask Mr. Levin to talk with probation about it, make sure that probation does, in fact, continue with great care and concern the testing, random testing, so that you may prove to us that you're doing all right.

And, Mr. Levin, if you have any problems with that and probation, you let me know and I will make it further a specific order of this matter.

Now, with that admonition, Mr. Harris, if you're willing to be bound by the same terms that you were originally, and in addition to that, that you stay away from this crowd that stayed at your place, and engaged in the marijuana business, or smoking and using, I am going to let you remain at liberty until you are [158] called for your designation, or until the Court hears further information rendering the serious matter breach here.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Are you willing to accept those consequences and conditions?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

In that event, the Court will find that Mr. Harris at this point does not pose a danger to the community, nor does he pose a risk of flight. And under Title 18, 3143, the Court finds that he should and can remain at liberty, subject to the same terms and conditions which the Court has imposed here today.

You will report directly to the institution to which you're assigned.

It is my duty now to require, Mr. Harris, that you cooperate fully with the probation office in the preparation of the presentence report. You may talk to Mr. Ingram about what you should say to the probation office in connection with the offense with which you're charged here. And if you elect not to talk about it, because you pled not guilty before the Court, that will not be held against you. But in all other respects, it is my duty to require that you cooperate fully with the probation office, and so that all things necessary for the Court [159] to consider can be brought to the Court at the time of sentencing.

You will cooperate?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. Where do you live, Mr. Harris?



THE DEFENDANT: In Ansonville.

THE COURT: I understand that. Under what conditions? What are your living conditions? Who are you living with?

THE DEFENDANT: I live with my girlfriend right back there. I rent a house from that lady over there, Cathy. Back behind her house. It's just me and her, that's it.

THE COURT: How long have you been living with this girlfriend?

THE DEFENDANT: About a year now.

THE COURT: So you are just living, no plans to marry, just having a good time?

THE DEFENDANT: Yeah, I probably will marry her.

THE COURT: Probably will? You haven't asked her yet, just having a good time?

The Court doesn't really take a great interest in that. It's not particularly interested in you doing that, but I'm not going to impose my personal wishes at this point. I don't find that to be a necessarily good situation. All right.

Anything else, Mr. Ingram?

[160] MR. INGRAM: No, Your Honor.

THE COURT: Mr. Levin?

MR. LEVIN: No, Your Honor.

THE COURT: All right. Thank you both. Thank you for your presentation.

(Court concluded.)

* * *

---



IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| | : | |
| v. | : | 1:99CR191-1 |
| WILLIAM JOSEPH HARRIS | : | |

## POSITION OF THE UNITED STATES WITH RESPECT TO SENTENCING FACTORS

NOW COMES the United States of America, by and through Walter C. Holton, Jr., United States Attorney for the Middle District of North Carolina, pursuant to Standing Order Number 20 of the Implementation of Sentencing Procedures Under the Sentencing Reform Act of 1984, and files its Position of the United States With Respect to Sentencing Factors.

## PROCEDURAL HISTORY

On August 31, 1999, Defendant Harris was charged in a four-count indictment. On October 26, 1999, Defendant Harris pled guilty to Count 1, alleging that on April 30, 1999, the Defendant distributed 114 grams of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D). Contrary to his plea, the Defendant was convicted of Count 2, which alleged that on April 30, 1999, the Defendant in furtherance of a drug trafficking crime, that is, distribution of marijuana, possessed a Taurus 9mm pistol, in violation of 18 U.S.C. § 924(c)(1). The Government dismissed Counts 3 and 4 of the indictment.

Thereafter, the Probation office prepared a Presentence Report (the "PSR") in which it computed Defendant's offense level and determined the Court's sentencing options.

Defendant's counsel thereafter filed an objection to the PSR asserting that Defendant should receive credit for acceptance Of responsibility. Government's counsel filed an objection to the PSR asserting that Defendant testified that he had purchased between 8 to 12 pounds of marijuana since 1992. Thus, his base offense level should be 12 with a guideline range of 10 to 16 months. The Government further objects in this position paper to The sentencing options set forth under paragraph 41 in the PSR. Specifically, for Count 2, because the Defendant brandished the firearm, the term of imprisonment is not less than 7 years, rather than the 5 years set out in the PSR.

Based Upon the Amount of Drugs Defendant Admitted to Purchasing, The Base Offense Level Should be 12.

Defendant Harris testified at his trial that he had been selling drugs for six years. (J.A. 86). He identified those individuals from whom he had been purchasing the drugs for resale. (J.A. 88-89). He estimated the total amount of drugs he had purchased from these individuals over the six-year period he had been selling drugs to be between 8 to 12 pounds of marijuana. (J.A. 90). Finally, he identified the individuals to whom he had been selling the drugs. (J.A. 91-93).

The Defendant's testimony concerning his drug distribution activities is corroborated by the fact that he was



observed selling marijuana from his pawn shop on several occasions.

The Defendant's own estimate, while self-serving, is the best evidence thus far to determine the appropriate relevant conduct.

The Defendant might argue that the distribution of 8 to 12 pounds of marijuana, even if an accurate estimate, should not be considered "relevant conduct." Once it is determined that the charged and uncharged offenses should be grouped together under U.S.S.G. § 3D1.2(d), this court must determine that the offenses are "part of the same course of conduct or common scheme or plan as the offense of conviction" in order to consider the uncharged offenses as relevant conduct. *See* U.S.S.G. § 1B1.3(a)(2); *see also United States v. Mullins*, 971 F.2d 1138, 1143 (4th Cir. 1992). Commentary to U.S.S.G. § 1B1.3 explains that "[f]or two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victim, common accomplices, common purpose, or similar *modus operandi*." U.S.S.G. § 1B1.3, comment. (n.9). Further, "[o]ffenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." *Id.* Factors to be considered include similarity, regularity and temporal proximity between the offense of conviction and the uncharged conduct. *Mullins*, 971 F.2d at 1143 (citing *United States v. Hahn*, 960 F.2d 903 (9th Cir. 1992), *cert. denied*, 510 U.S. 949 (1993)). The absence of a factor does

not bar the consideration of the uncharged conduct as relevant conduct; rather, "a district court should 'look for a stronger presence' of at least one of the components if one of the components is not present at all." *Id.*

This court should consider all of the drugs associated with the uncharged conduct as relevant conduct under both the common scheme or plan and the same course of conduct analyses. First, the uncharged conduct and the offense of conviction shared a common purpose and a similar *modus operandi*. The common purpose was to gain financially through the sale of the drugs. The Defendant specifically admitted that his intent was to obtain drugs at no cost and therefore gain financially. (J.A. 94). The similar *modus operandi* was that, since 1996, he sold the drugs out of his pawn shop and would use the proceeds to pay his supplier and purchase more drugs. (J.A. 91, 100). Apparently, he possessed a firearm during many of the sales.

Accordingly, Defendant's multiple sales committed over a six-year period were part of a common scheme or plan within the meaning of U.S.S.G. § 1B1.3(a)(2). As such, all of the drugs associated with the sales should be considered in the calculation.

*Because the Defendant "Brandished" a Firearm Within the Meaning of 18 U.S.C. § 924(c)(4), the Court Should Sentence Him to Seven Years under 18 U.S.C. § 924(c)(1)(A)(ii) as to Count Two.*

The second count of the indictment against the Defendant charged him with violating 18 U.S.C. § 924(c)(1)(A). The Defendant was adjudged guilty of said count following a bench trial.



For offenses committed on or after November 13, 1998, such as the one at issue in this case, subparagraph 924(c)(1)(A) provides as follows:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall in addition to the punishment provided for such crime of violence or drug trafficking crime
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) *if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years;* and
>
> (iii) if the firearm is discharged be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A) (emphasis added).

As of the same effective date, paragraph 924(c)(4) declares that:

> For purposes of this subsection [924(c)], the term "brandish" means, with respect to a firearm, to display all or part of the firearm, *or otherwise make the presence of the firearm known to another person, in order to intimidate that person,*

*regardless of whether the firearm is directly visible to that person.*

18 U.S.C. § 924(c)(4) (emphasis added).

The facts set forth in the PSR confirm that in this case the Defendant "otherwise ma[d]e the presence of the firearm known to another person in order to intimidate that person. . . . " *See* PSR at ¶ 5. Accordingly, "regardless of whether the firearm [wa]s directly visible to that person," the Defendant "brandished" a firearm under 18 U.S.C. § 924(c)(4). As a result, the PSR should prescribe a seven-year mandatory minimum sentence as to the firearm count in this case. *See* 18 U.S.C. § 924(c)(1)(A)(ii) (stating that "if the firearm is brandished, [defendant shall] be sentenced to a term of imprisonment of not less than 7 years").

Despite the fact that the Defendant "brandished" a firearm within the meaning of 18 U.S.C. § 924(c)(4), he may contend that the Court may not impose the sentence provided by law for such conduct because his indictment did not contain the word "brandish." In making this argument, the Defendant may rely upon *Jones v. United States*, 119 S.Ct. 1215 (1999), wherein the Supreme Court held that provisions of the federal carjacking statute, 18 U.S.C. § 2119, establishing markedly higher penalties when "serious bodily injury" or "death" results, create separate offense elements requiring proof beyond a reasonable doubt. For numerous reasons, however, *Jones* does not support the claim that the absence of the word "brandish" from the instant indictment precludes this Court's imposition of the otherwise clearly applicable



seven-year mandatory minimum sentence from 18 U.S.C. § 924(c)(1)(A)(ii).

The *Jones* Court focused on unique aspects of the carjacking statute's structure and legislative history in determining that "serious bodily injury" and "death" constituted elements of distinct carjacking offenses, rather than sentencing factors for one basic carjacking crime. Most notably, the Supreme Court cited the fact that congress based the carjacking law upon two other federal robbery statutes that explicitly made "serious bodily harm" and/or "death" offense elements, just as countless state crimes did. *See id.* at 1219-21.

The statutory provision at issue here does not suffer from the structural or enactment-related quirks that led to the *Jones* decision. As an initial matter, unlike the phrases in *Jones*, the term "brandishing" has no pedigree as an element of analogous federal or state statutes, but rather comes from the Sentencing Guidelines, where obviously it serves as a sentencing factor for courts to resolve, not an offense element for juries to find. *See* U.S.S.G. § 2B3.1(b)(2) (providing that "if a firearm was brandished . . . increase [robbery offense level] by 5 levels").

The legislative record leading to the November 13, 1998, reform of 18 U.S.C. § 924(c) further confirms that Congress intended "brandishing" to serve as a consideration for sentencing, not an element of a new crime. Prior to the amendment in question, paragraph 924(c)(1) stood as a discrete offense, with alternative *actus reus* elements of "using" or "carrying" a firearm. In *Bailey v. United States*, 516 U.S. 137 (1995), the Supreme Court narrowed

the widely-accepted definition of "using" a firearm, thereby sparking a congressional response.

Initial versions of the bill that eventually became law on November 13, 1998, struck out "using" and "carrying" as the physical act elements of subsection 924(c) and replaced them with new *actus reus* elements of "possessing," "brandishing," and "discharging." *See, e.g.*, 142 Cong. Rec. H2674-01, H2685-H2686 (Mar. 22, 1996) (setting out section of bill entitled "Mandatory Prison Terms for Possessing, Brandishing, or Discharging a Firearm or Destructive Device during a Federal Crime that is a Crime of Violence or a Drug Trafficking Crime"). Under that proposal, "brandishing" clearly would have become an element of a distinct offense. The reform ultimately adopted by Congress, however, did not follow that course.

Instead, the November 13, 1998, amendment retained the physical act elements of "using" and "carrying," and added only one new *actus reus*, "possessing a firearm in furtherance of the crime." *See* 18 U.S.C. § 924(c)(1)(A). Rather than including "brandishing" and "discharging" as additional disjunctive physical act elements, Congress placed those terms in separate penalty provisions. *See id.* Accordingly, in this case, unlike *Jones*, statutory structure and legislative history support the treatment of "brandishing" as a sentencing factor, not as the key element of a new offense.

In addition, both before and after the Supreme Court's ruling in *Jones*, courts have held that other provisions of paragraph 924(c)(1) that raise the applicable statutory penalty based on the type of firearm involved,



*see* 18 U.S.C. § 924(c)(1)(B), represent sentencing factors, not offense elements. *See, e.g., United States v. Eads*, 191 F.3d 1206, (10th Cir. 1999) ("[W]e agree with the Fifth Circuit that the type of firearm used or carried is a sentencing enhancement rather than an element of the offense, and that this is not in conflict with the Supreme Court's decision in *Jones*."); *United States v. Castillos*, 179 F.3d 321, 328 (5th Cir. 1999) (concluding that decision in *Jones* turned on ambiguous structure and legislative history of carjacking statute and, therefore, "declin[ing] to reconsider [Fifth Circuit's] prior decision that the type of firearm used or carried is a sentencing enhancement, and not an element of the offense"); *United States v. Alborola-Rodriguez*, 153 F.3d 1269, 1272 (11th Cir. 1998) (holding that "type of firearm involved in a § 924(c) offense is not an element of the offense and is thus not a question for the jury; instead it is a sentencing question to be resolved by the sentencing court by a preponderance of the evidence"), *cert. denied*, 119 S. Ct. 1809 (1999); *United States v. Shea*, 150 F.3d 44, 51 (1st Cir.) (ruling that "assault weapon provision is not an element of the § 924(c)(1) offense, but instead, a sentencing enhancement"), *cert. denied*,[1] 119 S.Ct. 568 (1998).

The Fourth Circuit adopted the same approach in an unpublished decision. *See United States v. Cooper*, 953 F.2d 640, 1992 WL 14592, **2 (4th Cir. Jan. 30, 1992) (affirming district court's imposition of 30-year, rather than five-year sentence, based on type of firearm, despite defendant's claim that "jury rather than the court should have

---

[1] Only the Ninth Circuit has taken the contrary view. *See United States v. Alerta*, 96 F.3d 1230, 1235 (9th Cir. 1996).

made the determination of whether he used a machine gun"), (copy attached) *cert. denied*, 118 S.Ct. 1570 (1998).

Under 18 U.S.C. § 924(c)(1), matters regarding the degree of firearm involvement (*i.e.*, "brandishing" or "discharging") and issues related to the type of firearm involved (*i.e.*, "machine gun" or "semiautomatic assault weapon") both lead to enhanced sentences and are set out separately from the offense elements. In this context, no rational theory of statutory construction can support the simultaneous treatment of the former category of enhancements as offense elements and the latter one as sentencing factors. This Court thus should embrace the persuasive authority counseling that all these matters constitute considerations for courts at sentencing, not juries at trial.

In two recent cases before this Honorable Court, per Judge Bullock, this Court ruled that "brandishing" in a 924(c) context is a sentencing factor. *United States v. Whitt* (1:99CR29-1) (transcript attached, 23-25); *United States v. Jackson*, (1:99CR8-1). Recognition of the penalty enhancements within 18 U.S.C. § 924(c)(1) as sentencing factors (rather than as offense elements) not only follows precedent and logic, but also promotes sound judicial policy. The contrary approach would cause undue confusion and complication of the trial process. For example, treatment of these matters as offense elements would create complex issues regarding lesser-included crimes and would necessitate intricate special verdicts, trends likely to burden courts and to impair the judgment-rendering capacity of juries faced with the requirement of unanimity.



In light of all these considerations, the Court should impose the seven-year mandatory minimum sentence enacted by Congress to punish "brandishing" of firearms during federal drug crimes, the very behavior in which the Defendant engaged.

This the 12th day of January, 2000.

Respectfully submitted,

WALTER C. HOLTON, JR.
United States Attorney

/s/ Steven H. Levin
STEVEN H. LEVIN
Assistant United States Attorney
NCSB #19135

P. O. Box 1858
Greensboro, NC 27402

336/333-5351

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing position was served upon the persons hereinafter named, either personally or by placing the same in the United States Mail, this the 12th day of January, 2000, addressed as follows:

Addressees: Bob Wright
United States Probation Office

William C. Ingram, Esquire
101 South Elm Street, Suite 210
Greensboro, NC 27401

/s/ Penny Simmmons
PENNY SIMMONS
Paralegal Assistant
United States
Attorney's Office

P. O. Box 1858
Greensboro, NC 27402
336/333-5351

---

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

[Caption Omitted In Printing]

* * *

[86] anything that would prohibit them from doing that?

Let's take a break until 20 minutes to 2:00.

(Recess taken from 12:25 p.m. until 1:40 p.m.)

THE COURT: Mr. Harris, if you would, come back to the stand, please, sir.

Mr. Harris, you're still under oath from this morning.

Mr. Levin.

MR. LEVIN: Thank you, Your Honor.



CROSS EXAMINATION

BY MR. LEVIN:

Q Mr. Harris, you've owned a pawn shop since November '96, is that right?

A Yes, sir.

Q And you have had two pawn shops total?

A Yes, sir.

Q And how long have you been selling drugs?

MR. INGRAM: Objection.

THE COURT: Overruled.

THE DEFENDANT: I guess since I was about 16.

BY MR. LEVIN:

Q How old are you now?

A 22.

Q You started selling marijuana since you were 16?

A Yes, sir.

Q Where do you get the marijuana?

* * *

[88] this picture has been taken?

A Looks like – it looks like the corner of my sister's bedroom. That's the fish tank right there.

Q Do you see'a rifle in that picture?

A Yeah.

Q Is it hanging on the wall?

A No.

MR. LEVIN: If I can retrieve the exhibit.

I would like to move this into evidence, Your Honor, as Government's Exhibit Number 8.

THE COURT: Any objection, Mr. Ingram?

MR. INGRAM: No, Your Honor.

THE COURT: It's admitted.

BY MR. LEVIN:

Q How long have you been buying drugs from your sister's boyfriend?

A About eight months.

Q Before that, where did you buy the drugs?

A A guy named Levi.

Q Is that in Stanly County?

A Yeah.

Q How long did you buy drugs from him?

A Just a couple years, probably.

THE COURT: What is Levi's last name?

THE DEFENDANT: Crawford.



[89] BY MR. LEVIN:

Q Before you bought the drugs from Levi Crawford, where did you buy the drugs?

A From a guy named Shane Rummage, R-U-M-M-A-G-E.

Q How long did you buy drugs from Mr. Rummage?

A Since 1992.

Q What kind of drugs did you buy from these individuals?

A Marijuana.

Q Only marijuana?

A Uh-huh (affirmative.)

Q Is that a yes?

A Yes, sir.

Q Did you offer for sale opium to Agent Boykin?

A Yeah.

Q It wasn't opium, was it?

A No, sir.

Q You were not being truthful when you identified it as opium?

A I thought it was. That's what I was told.

Q Where did you buy it?

A From a guy named Gene Scott.

Q How much marijuana would you say you purchased in total from all these people over the last six years?

MR. INGRAM: Objection.

THE COURT: Overruled.

BY MR. LEVIN:

[90] Q Let me ask that again. Approximately how much marijuana would you say you purchased, from the individuals you identified, over the past six years, dating back to 1992?

A I don't know. Probably, I would say, between 8 and 12 pounds total.

Q How many times have you visited these individuals?

A Not – rarely. It was a monthly, bi-weekly, every other week sometimes. I wouldn't get that much, though. So, really, if you add it up; it wouldn't – it wouldn't be that much.

Q Did you have a pound in your knapsack on April 30th when you sold to Agent Boykin marijuana?

A I don't recall exactly what incident that was. Be more specific and I would answer for you.

THE COURT: Let him get his question out, then you can answer.

BY MR. LEVIN:

Q When you were in the vehicle behind the pawn shop on April the 30th, how much marijuana did you have in your knapsack?



A Eight ounces.

Q Is that in addition to the 114 grams that you sold to Agent Boykin?

A That was altogether.

Q Did you indicate to Agent Boykin, after he paid you the money, that you now had enough to go pay your supplier?

A I don't recall.

[91] Q Do you recall going to pay your supplier after Agent Boykin gave you the $360?

A I don't recall.

Q Did your supplier front you the drugs?

A Sometimes.

Q And then did you go pay your supplier after you made money from the sales?

A Yeah, whenever I got the money together.

Q Since 1996, since you opened up the first pawn shop, how many marijuana customers did you have?

A At first I only had a couple. Then I just – they just – a couple of their friends. Like I say, I didn't sell to but – about four people in the last three years.

Q In the last three years you have only sold to four people?

A I had four friends that bought from me.

Q You didn't have anybody else?

A No.

Q You had Agent Boykin.

A I mean, I had four people I dealt with until I was introduced to Mr. Boykin there.

Q So, prior to April 29th, you only dealt with four people?

A Yes, sir.

Q And what were their names again?

A Garland Pucket, Lee McRae, and a guy named Rick Wood, and my brother Rodney Deaton.

[92] Q And is Rodney your half brother?

A Yeah, he is my half brother.

Q Did Rodney bring other customers in like he brought in Agent Boykin?

A Yeah, he did before.

Q That would be four people, plus people Rodney brought in?

A Well, he brought – like I said, he would come up there and get it for other people.

Q Did he ever bring anybody else with him?

A I think he brought a guy up there, one guy named Chip Coyer.

Q So, now we have six people, including Agent Boykin?

A Six?



Q You have your four friends, Agent Boykin, and now Chip Coyer?

A Right.

Q Anybody else?

A Not that I know of.

Q Do you recall April 28, that is the day before you met Agent Boykin, did your half brother come visit you?

A Yeah, he sure did. He had a female with him. That's right. Yeah, sure did.

Q So, is that seven now?

A Uh-huh (affirmative.)

Q And you sold marijuana to her?

A Uh-huh (affirmative.)

[93] Q Is that a yes?

A Yes, sir.

Q Do you recall how much you sold to her?

A I think it was a half ounce that day.

Q How much did you get for a half ounce?

A $60.

Q Did you pay her $100?

A Huh?

Q Excuse me, did she pay you $100?

A No, sir.

Q How often would Rodney come visit you in the store?

A Oh, I would say Rodney only come around about twice a month.

Q And each time he came by, was it for the purposes of buying marijuana?

A No, sir. He is my brother. He just come around a lot of times to look at what I had.

Q Do you recall now – do you recall that he brought anybody else with him other than –

A No, because most of the time he come up there, you know, he would be getting whatever for somebody else, you know.

Q You indicated that – strike that. You have two businesses, don't you?

A No, sir, I only had one.

Q What is your one business that you identified?

A Harris Pawn Shop.

[94] Q Okay. Were you also selling marijuana? Would you call that another business?

A No.

Q You made money on it, didn't you?

A No.

Q You didn't make any money?

A No.



Q So, why did you sell marijuana?

A Basically, to be honest with you, I sold marijuana so what I would have left over I would have for free and wouldn't have to buy myself.

Q In that respect you made money, didn't you? You were getting something for free?

A Yeah, if you look at it like that.

Q So, then, it's a business, isn't it?

A No.

Q You had scales in your pawn shop?

A Yes, sir.

Q And you used those scales for weighing gold?

A Yes, sir.

Q And the gold is weighed and sold in the pawn shop?

A Yes.

Q You also used the scales to weigh your marijuana –

A Yes, sir.

Q – when you sold marijuana at the pawn shop?

* * *

[100] A I never didn't really profit nothing.

Q You got $360 from Special Agent Boykin?

A Right.

Q What did you do with that money?

A I put it in my wallet.

Q Did you always put the money in the wallet?

A Yes. Then I would take it over to my sister's boyfriend.

Q To pay him back because he fronted you the drugs?

A Right. Or if I bought it, then, you know, I would put the money back.

THE COURT: What's that now? If you bought it?

THE DEFENDANT: If I didn't get it fronted, if I went over to his house and paid him cash for it, then I would pay myself back with the money.

THE COURT: Where would you put that cash?

THE DEFENDANT: Back in the pawn shop.

BY MR. LEVIN:

Q In the cash register in the pawn shop?

A Yeah.

Q So, you carried your weapon to – was it to deter people so that these criminal elements or these elements that were attracted to the pawn shop, was it to deter them from robbing you?

A Yeah, hopefully.



Q Were you prepared to use it if you had to?

* * *

[23] of the $60,000.00 towards restitution. And in speaking to my client this morning, I know the Court has already ruled in that matter with respect to the co-defendant. We are in agreement this morning that we simply have no standing to make that objection, and we withdraw the objection, Your Honor.

THE COURT: Thank you, sir.

MR. JONES: That third objection, Judge, had to do with whether or not it's going to be a five-year minimum or a seven-year minimum on the first 924(c) charge, as the indictment would allege "carry." And our position would be that it does not also allege use, that it cannot then be – the brandishing cannot be applied in that case to make a seven-year mandatory minimum. Brandishing in our mind means anonymous use, brandishing means anonymously carried. I understand the government's position on that, Your Honor. I believe Your Honor has already ruled in a case similar.

THE COURT: You're arguing that brandishing is an element of –

MR. JONES: I do, Judge. The *Jones* case; *Jones* and the new case out of the Fourth Circuit. The name escapes me right now, but it's in my position paper. That – I understand that Your Honor has already ruled on that in the past and, again, we would just stand on the objection, Your Honor.

THE COURT: Well, you know, that's a good point to make. I did rule on it about a month ago and, in

fact, I [24] think it was a case in which Mr. Auld was involved. It couldn't have been this case, I don't guess.

MR. AULD: No, Your Honor. It was *Rudy Jackson*. Mr. Smith represented Mr. Jackson.

THE COURT: And, you know, there are two Supreme court decisions and we had a lengthy discussion at that time on the record. I don't know that there's any transcript on it about the Supreme Court's two decisions in that area and the way the Justices were lining up. And I think I quoted, as I recall, some of Justice Scalia's descending opinion in one of the cases. *Jones* it may have been. It was a little different situation there in which it appeared that the primary concern, as I recall, of the Court, was that any time you are increasing the penalties for which a defendant could be exposed, there ought to be some type of notice or jury finding on that, increasing the top end.

Here we don't have exactly that situation. There's no change in the maximum sentence that Mr. Whitt is exposed to here, I don't believe. It's just a maximum statutory penalty that he would be exposed to. It's just an increase, is it not, in the minimum situation, which I think makes a difference here.

Of course, Mr. Whitt also – the notice requirement was clearly satisfied, I think, in this case.

Anything, Mr. Auld, you want to respond to in that?

[25] MR. AULD: No, Your Honor. I think the Court has adequately set that out.

THE COURT: So we have, really, then, no issue the Court has not ruled on then. I denied the motion to



withdraw the guilty plea. I have indicated that the defendant could be exposed to multiple 924(c) counts on these six robberies. You've withdrawn your argument about the $60,000.00 toward restitution. You did mention, although you did not really wish to be heard, the five-level increase for the firearm set out in the presentence report. And you've made your argument on the *Jones* case, that the government was required to allege the brandishing in the indictment to increase the penalty from five to seven years. And the Court disagreed with that.

Any other factors that we need to consider concerning the presentence report, Mr. Jones?

MR. JONES: Judge, there were some minor factual variances about whether the gun was in the camper or not. And I don't think that would change anything for the purposes of sentencing. They're really not legal issues, and I don't think they need to be resolved unless Your Honor differs with my opinion on that.

THE COURT: All right. Well, the Court will find the remaining facts as set out in the presentence report and make it part of the record under seal in this case.

Now Mr. Whitt has a criminal history category of one

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | No. 1:99CR191-1 |
| v. | : | |
| WILLIAM JOSEPH HARRIS | : | |

DEFENDANT'S RESPONSE TO
GOVERNMENT'S POSITION
CONCERNING SENTENCING FACTORS

(Filed Feb. 7, 2000)

On January 11, 2000, the defendant filed a "Position of Defendant With Respect to Sentencing Factors and Response to Government's Objections." In that pleading, the defendant addressed the issue of the denial of a reduction in his offense level for "acceptance of responsibility" as set forth in the Presentence Report, and also responded to objections by the government to the Presentence Report in which the government asserted that a greater amount of marijuana should be attributed to the defendant than the Presentence Report attributes to him. On January 13, 2000, the government filed a "Position of the United States With Respect to Sentencing Factors," in which the government again presents the argument concerning the amount of marijuana to be attributed to the defendant, and also argues that the defendant should be sentenced to a seven-year mandatory prison term for his conviction pursuant to 18 U.S.C. § 924 because the conduct of the defendant meets the definition of "brandishing" a firearm within that statute. The defendant is



filing this supplemental response to address that latter issue.

The indictment in this case charged in Count Two that the defendant carried a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). That statute provides that, if a defendant is convicted of carrying a firearm during and in relation to a drug trafficking crime, the defendant shall be sentenced to a term of imprisonment of not less than five years. 18 U.S.C. § 924(c)(1)(A)(i).

The government now contends that the defendant should be subject to a term of imprisonment of not less than seven years because the defendant "brandished" the firearm in question, applying the conduct of the defendant to the definition of "brandish" in 18 U.S.C. § 924. The statute provides for a seven-year term of imprisonment if the firearm is brandished in 18 U.S.C. § 924(c)(1)(A)(ii), and in 18 U.S.C. (c)(4), that term is defined as follows:

> For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

The defendant admitted at trial that he wore a pistol in a holster on his belt every day during business hours at his pawn shop, and that he was wearing the pistol accordingly when he sold marijuana to the undercover agent on several occasions at the pawn shop. Therefore,

although the evidence supports a finding that the defendant displayed the firearm on those occasions, the evidence does not support a finding that the defendant did so "in order to intimidate . . . " the undercover agent who was purchasing the marijuana on four occasions.

The defendant testified that he wore the firearm during every business hour of every business day at the pawn shop, and that he did so solely for protection in his pawn shop business. The defendant testified that he left the firearm in a locked drawer at the pawn shop at closing time on every evening as he left the pawn shop, and that he never took the firearm home with him. He also testified that most of his marijuana transactions took place at his home, and only on rare occasions did someone come by the pawn shop to pick up marijuana from him. He testified that he never had a firearm in his home, and therefore he never carried or used a firearm in relation to the marijuana transactions at his home.

One of the defendant's marijuana customers, Lee James McRae, testified that he was present in the pawn shop on many occasions when the defendant closed the shop at the end of the day, and he always observed the defendant to lock up the firearm and leave without the firearm. McRae also testified that he has never observed the defendant outside of the pawn shop in possession of his firearm, and that he, McRae, has purchased marijuana from the defendant only at the defendant's home. McRae had never observed the defendant to have a firearm in his residence.

All of those uncontradicted facts suggest that the defendant was not wearing the firearm on the occasions



when he sold marijuana to the undercover agent for the purpose of "intimidating" the agent. Moreover, the context of the meetings with the undercover agent, and the content of the conversations which took place during those meetings, demonstrate that those meetings were casual, friendly, and without even a hint of anyone being intimidated, or needing to be intimidated.

For example, the tape recording of the encounter between the defendant and the agent on April 29, 1999 (which included the remarks by the defendant about the power of his pistol and the ammunition), reveals a conversation of almost an hour in length in which many other subjects were discussed other than the marijuana transaction or the firearm. In fact, the discussions about the marijuana purchase and the firearm lasted approximately five to seven minutes out of a one hour conversation.

The tape reveals that, after the agent entered the pawn shop, approximately thirty minutes of conversation then ensued about guitar playing, friends who play in bands, various rock guitarists, how to play certain guitar chords, and the pros and cons of keeping an inventory of guitars in a pawn shop. The agent himself participated actively in that discussion. In the background, there is raucous laughter and conversation involving at least several other persons who were present at the time. Most importantly, the encounter between the defendant's half-brother, Rodney Deaton, accompanied the agent to the pawn shop and was present during this lengthy conversation.

In short, the tape reveals that neither the defendant nor the agent were tense, cautious, or anything other than at ease with each other in this conversation. The presence of the defendant's brother further underscores the defendant's comfort level with his customer, the undercover agent. Therefore, the defendant contends that the facts of this case do not justify a conclusion that the defendant "displayed all or part of the firearm, . . . in order to intimidate . . . " the undercover agent.

Moreover, the defendant contends that the government cannot rely on the "brandishing" clause of 18 U.S.C. § 924(c) to support the seven-year term of imprisonment because that clause is not merely a sentencing enhancement, but is an element of a separate offense which the government was required to specifically charge in the indictment and prove beyond a reasonable doubt at trial. *See Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). In the *Jones* case, the Supreme Court held that the provisions of the federal carjacking statute, 18 U.S.C. § 2119, establishing significantly higher penalties when "serious bodily injury" or "death" results, created separate offense elements requiring proof beyond a reasonable doubt. The defendant contends that the same analysis applies in this case for the following reasons.

First, the pertinent portions of 18 U.S.C. § 924(c) and 18 U.S.C. § 2119 are virtually mirror images of each other. Each statute contains a general clause stating the conduct that is prohibited, (in an incomplete sentence), and then a subsection of that clause provides the penalty provision. Next, each statute then contains, a second subsection, providing for increased penalties under certain conditions – i.e., in the carjacking statute for "serious bodily



injury" or "death," and in 18 U.S.C. § 924(c) for "brandishing" a firearm. See copies of the relevant portions of each of these statutes attached hereto as Exhibit A. The structure of these two sections is strikingly similar, if not virtually identical.

The analysis of the Supreme Court of the carjacking statute also fits 18 U.S.C. § 924(c) like a glove. The Court initially recognized that the serious bodily injury provision of the carjacking statute was contained in a separate subsection from the first section of the statute, in which the primary elements of the crime were listed, and therefore the statute "had a look" that suggested that serious bodily injury was merely a sentencing factor. *Jones v. United States*, 119 S. Ct. at 1219. However, the Court concluded that this appearance was deceptive for several reasons.

First, the Court noted that the serious bodily injury section established "steeply higher penalties" than cases not involving serious bodily injury. Moreover, the Court noted that the "steeply higher" penalty range was conditioned on a further fact – i.e., whether serious bodily injury occurred – a fact which was just as important as the primary elements of the crime. Finally, the Court noted that the serious bodily injury subsection was not really a separate section, because the first clause of the statute would constitute an incomplete sentence without it. *Id.* at 1219-20. That precise analysis applies to 18 U.S.C. § 924(c).

Next, because the text alone did not justify any confident inference as to whether the serious bodily injury language was a sentencing enhancement or an element of

the offense, the Supreme Court considered whether or not other federal statutes included serious bodily injury as an offense element. The Court concluded that Congress has frequently, although by no means always, treated "serious bodily injury" as an offense element in other context. *Id.* at 1220-21. The Court also noted that bodily injury often was an offense element in analogous state statutes as well. *Id.* at 1221-22.

The defendant has not identified any legislative history which directly speaks to the issue of whether "brandished" was intended to be a sentencing factor or an offense element. Notably, the Supreme Court did not rely heavily on legislative history in *Jones*, either. However, the defendant has identified two statutes, one from West Virginia and one from the United States Virgin Islands, in which brandishing a weapon is a crime in and of itself. *See* W. Va. Code, § 61-7-11, a copy of which is attached hereto as Exhibit B, and VI Code Ann. tit. 14 § 621, a copy of which is attached hereto as Exhibit C. The Supreme Court recognized that it would be an "oddity" to find a term to be a statutory crime with its own offense elements in one instance, and merely a sentencing consideration in another instance. Because "brandishing" is a statutory crime with its own elements in two jurisdictions, judicial consistency calls for the term to be treated as an offense element, not merely a sentencing consideration.

Finally, in *Jones*, the Court asserted that, because its analysis under the above steps left open the possibility that serious bodily injury was a sentencing factor, the statute nevertheless should be construed as requiring that serious bodily injury be charged as an offense element



under the canon of constitutional avoidance. *Id.* at 1222-28. The Court concluded that treating any fact (other than a prior conviction) that increases the maximum penalty for a crime as a sentencing factor, rather than as an element of the offense, would raise concerns involving both Fifth Amendment due process and the Sixth Amendment right to a jury. *Id.* at 1224 n.6.

Because the carjacking statute in *Jones*, and 18 U.S.C. § 924(c) are virtually identical, the same analysis utilized by the Supreme Court in *Jones* compels a conclusion in this case that the "brandishing" section of 18 U.S.C. § 924(c) is an element to be proved by the government, and not merely a sentencing enhancement. Because the government did not charge that element in the indictment, and did not prove that element beyond a reasonable doubt at trial, the court cannot now apply that provision and impose the seven-year mandatory term of imprisonment as a sentencing enhancement.

Respectfully submitted, this 7th day of February, 2000.

LOUIS C. ALLEN, III
Federal Public Defender

/s/ William C. Ingram
WILLIAM INGRAM
First Assistant Federal
Public Defender
NCSB # 9884
101 S. Elm. St., Suite 210
Greensboro, NC 27401
Telephone (336) 333-5455

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing on the below-mentioned persons by mailing a copy of the same to the following addresses:

Mr. Steven H. Levin
Assistant United States Attorney
P. O. Box 1858
Greensboro, NC 27402

This, the 7th day of February, 2000.

/s/ William C. Ingram
WILLIAM C. INGRAM
First Assistant Federal
Public Defender

---

EXHIBIT A

18 U.S.C. § 2119

**§ 2119. Motor vehicles**

Whoever, with the intent to cause death of serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –

(1) be fined under this title or imprisoned not more than 15 years, or both,



(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

---

18 U.S.C. § 924

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

---

EXHIBIT B

**WEST VIRGINIA CODE 1966**
**CHAPTER 61. CRIMES AND THEIR PUNISHMENT.**
**ARTICLE 7. DANGEROUS WEAPONS.**

Copyright © 1966-1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Properties Inc.
All rights reserved.
Current through End of 1999 2nd Ex.Sess.

**§ 61-7-11** Brandishing deadly weapons; threatening or causing breach of the peace; penalties.

It shall be unlawful for any person armed with a firearm or other deadly weapon, whether licensed to carry the same or not, to carry, brandish or use such weapon in a way or manner to cause, or threaten, a breach of the peace. Any person violating this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than one thousand dollars, or shall be confined in the county jail not less than ninety days nor more than one year, or both.

---



EXHIBIT C

VIRGIN ISLANDS CODE ANNOTATED
TITLE FOURTEEN, Crimes
CHAPTER 31, Disorderly Conduct

Copyright ©1999 by The Lieutenant Governor for the Government of the United States Virgin Islands

Current through End of 1999 Reg. Sess.

§ 621 Brandishing, exhibiting, or using deadly weapons

Whoever –

(1) not in necessary self-defense, and in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry, and threatening manner; or

(2) in any manner unlawfully uses the same in any fight or quarrel –

shall be fined not more than $200 or imprisoned not more than 1 year, or both.

---

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>WILLIAM JOSEPH HARRIS,<br>Defendant. | Criminal Action No. 1:99CR 191-1<br>Greensboro, North Carolina<br>February 17, 2000<br>11:30 a.m.<br>(Pages 1-48) |

TRANSCRIPT OF SENTENCING HEARING

BEFORE THE HONORABLE WILLIAM L. OSTEEN, SR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:
STEVEN H. LEVIN, ESQUIRE
Assistant United States Attorney
Post Office Box 1858
Greensboro, North Carolina 27402

For the Defendant
William J. Harris:
WILLIAM C. INGRAM, ESQUIRE
Assistant United States Public Defender
101 South Elm Street, Suite 210
Greensboro, North Carolina 27401

Court Reporter:
Mary Jo Beck, CSR, RPR, RMR
Room 101, U.S. Courthouse Building
324 West Market Street
Greensboro, North Carolina 27401



Proceedings reported by stenotype reporter. Transcript produced by computer-aided transcription.

* * *

[2] (Defendant present.)

MR. LEVIN: Government calls *United States of America versus William Joseph Harris,* Case Number 1:99CR191-1. Mr. Harris is represented by his attorney Mr. Bill Ingram, and this matter is on for sentencing, Your Honor.

THE COURT: All right. Let me get my file straight here. Mr. Ingram, are you and your client ready to proceed here today?

MR. INGRAM: Yes, Your Honor.

THE COURT: There were two objections filed to the presentence report prepared by Mr. Wright, one by the Government and one by the defendant.

Mr. Ingram's position is that the weapon should not be counted in association with his criminal activity, that the weapon was there for the pawn shop operation and not the drug operation.

And the Government had two objections, didn't you?

MR. LEVIN: Actually, Your Honor, the Government initially objected on two grounds, that there is a seven year mandatory minimum sentence, and that the amount of drugs should be eight to twelve pounds.

The first issue was resolved in the PSR, which now reads seven years, but we still have our objection to the weight of the drugs. I believe Mr. Ingram, on behalf of his

client, has two objections: One is the acceptance of responsibility, and [3] the second is the seven years versus five years.

THE COURT: All right.

MR. INGRAM: That's correct, Judge.

THE COURT: I suppose that the acceptance of responsibility, if we put it in proper course, is your duty to show the Court by the greater weight of the evidence that you're entitled to acceptance of responsibility. And it would be your duty to show that the seven years is appropriate rather than the five years, isn't that right, Mr. Levin?

MR. LEVIN: Yes, Your Honor, in addition to the weight.

THE COURT: Right. Then let's take that one first.

Do you have something, Mr. Ingram?

MR. INGRAM: Take which one first?

THE COURT: We will take the seven year matter first.

MR. LEVIN: Your Honor, hopefully the Court has had an opportunity to review the position paper. I don't wish to regurgitate everything that is in there, but the statute does read that if an individual brandishes a weapon, there is a mandatory minimum of seven years.

In this case the evidence established that the weapon was brandished. The definition of brandishing being that it was made known to another. The evidence at trial



established that the defendant on several occasions, in particular on the occasion which is charged in the indictment, the defendant displayed a firearm. In fact, he talked about the weapons being [4] able to protrude a bullet proof vest worn by a police officer.

Clearly, that satisfies the definition of brandishing under the statute; and on that alone, that's enough to make the seven year mandatory minimum sentence.

THE COURT: Tell me this, Mr. Levin, which may be set forth in the transcript, but I really didn't look for it, what was the occasion that caused Mr. Harris to hand over the weapon and talk about the bullets that were of a different make, and that's when he got into that comment about this is what can happen to a police officer, a law enforcement official? What conversation, if we can determine, led up to the showing, pulling out of the weapon and showing the bullets?

MR. LEVIN: Your Honor, I am hesitant to recite what the conversation was. The agent is not here, and I can't say that I recall with certainty the conversation in order.

I know there was a significant conversation on tape prior to the drugs being sold. There was just a casual conversation, the agent and defendant were getting to know one another. I know that prior to the drugs being discussed, Agent Boykin observed the weapon, and they discussed the weapon. I can't say if Agent Boykin said tell me about the weapon, who instigated the conversation about the weapon, but they did discuss the weapon, the power of the bullets. And then, I believe immediately afterwards, and I might stand corrected, but I believe

immediately afterwards the discussion about the drug [5] sale commenced.

THE COURT: Let me tell you, Mr. Levin, that you can address it. I'm not sure what Mr. Ingram's position is, in addition to his written submission, but I don't know what part of the defendant's business was drugs and what part was pawn shop operation. And it's not really material what part was.

What is material, I think is the fact that the defendant had a gun during the drug transaction, and there is no way that I can find that that was not for and during the drug transaction, because I think the facts would indicate that they were. So, I don't have any problems with that. But the gun was visible when these people walked up, as I understand it. And I believe, in totally legitimate pawn shop operations, there are people who do the same thing, that is, carry a gun.

I'm aware of what the commentary is on the brandishing a gun, but I have a hard time when a person is doing a legal act, if this man had a right to carry a gun, and I don't know the answer to that at this point, I am simply assuming that he had a right to carry a gun during his legal business. If he did, then in order to avoid the enhancement, if he wants to engage in criminal activity he has got to say excuse me while I take my gun off. Let's not talk about business until I take my gun off and put it somewhere out of sight.

Now, I am carrying my business on with you, and if I get caught, I'm at least not subject to an enhancement for that. It [6] bothers me that we might be dealing with a legal act that is clearly wrong if you're carrying a gun,



but brandishing enhances the penalty for it. And I may not have articulated very well what is giving me a problem, but I have some problem if that is the factual scenario.

Do you understand, not whether you agree or not, but do you understand the problem I am trying to raise in my own mind?

MR. LEVIN: Yes, sir.

THE COURT: All right. Tell me, what's the answer here?

MR. LEVIN: Your Honor, he wore – I think the evidence established at trial that the defendant carried the weapon for two purposes, or for one purpose, depending on how we look at this, but he carried it during his legitimate pawn shop trade, and he carried it during his unlawful drug trade. It served a dual purpose: To protect the lawful proceeds and to protect unlawful proceeds.

THE COURT: Right.

MR. LEVIN: It was worn to intimidate would-be criminals who would steal the lawful proceeds. It was worn to deter or intimidate people who wanted to steal his unlawful proceeds.

THE COURT: Do you concede that he had a right to wear it while he was carrying on his legitimate business or is that something we don't know?

MR. LEVIN: I don't know. I have no reason – I know that pawn shop owners do carry them, they have a

right to. I [7] don't know in this particular case if the defendant had a right to. I don't contest – I just don't know enough to contest.

THE COURT: If he didn't have a right to, that makes a difference to me. So, maybe Mr. Ingram can tell us whether he had a right to carry this gun.

MR. INGRAM: Your Honor, I think it was on private property. So, I think anybody has a right to carry a gun, wear it on the hip, in your premises or in your home.

THE COURT: I don't know if that's the law, that you can carry it in a business. And I really am asking, is that the law?

MR. INGRAM: I can't say definitively. That's what I believe is the law, but I can't say definitively. I can tell Your Honor that I have listened to the tape in question in its totality about a week ago, again. Of course, Your Honor heard about five minutes or so of that tape. It's about an hours worth of conversation, and that five minutes comes 30 to 40 minutes into that conversation. Up to that point they have been talking about, as I pointed out in my position paper, guitars, and how to play the guitar, and various rock bands they admired, and what bands they played in. And it was the ATF agent who first brought attention to this particular weapon, I think referring to that "hog leg" you're wearing there. That's when Mr. Harris took it out and showed him, and showed him the ammunition and told him about it.

[8] THE COURT: Okay.



MR. INGRAM: I have the tape here, if you want to listen to it.

THE COURT: I will be guided by what you say on that, unless Mr. Levin wants to take issue with it. If he does, I will either let him listen to it or play it, or whatever he wants to do. But I am going to, for my purposes of discussing the matter now, I am making two assumptions: One is that he had a legal right to wear that gun for his pawn shop business; and, two, that he did not pull the gun from the holster or mention the gun until asked by the agent about it. If either one of those is wrong, it would change my problem that I'm having, substantially.

MR. INGRAM: If it helps Your Honor in your assumption about the legality of his carrying a firearm, he obviously has not been charged with any firearm offense in state court. And if you recall, there was testimony that a deputy sheriff came by every week or two weeks to check pawn tickets, like they do in every pawn shop. So, there was a law enforcement officer coming through a couple times a month on an average while he was wearing that firearm, and apparently there was no problem perceived at that point.

THE COURT: That may help some. I don't think it resolves it completely. But you all understand where I am driving at here, and I will give you an opportunity.

[9] Now, Mr. Levin, I will hear from you.

MR. LEVIN: Even with those assumptions, Your Honor, he was – the defendant was brandishing the

firearm under the definition. There is not a whole lot more to say.

THE COURT: I understand.

MR. LEVIN: He was intimidating would-be criminals, whether they were stealing lawful proceeds or unlawful proceeds. That was the purpose. He even admitted in the – at trial, I can cite to the page of the transcript where at least he admitted at some point it was to – it was to deter. And I will just read it to the Court –

THE COURT: I read that this morning. I read it again this morning.

MR. LEVIN: So, again, it's a dual purpose, and it matters not whether he was carrying it for both purposes or just the one, to intimidate people in general. Those people in general, among those are people who are buying drugs from him, and that's enough to put him in that category of seven years.

THE COURT: I guess what you would say, if you were out instructing the public, is don't deal in drugs, deal in legitimate work. Don't deal in drugs. But I guess you may have a question that would put you in a position of saying well, it may be legitimate to carry a gun during the time that you're carrying on your legitimate activity, but if you're going to then suddenly deal in some illegal activity, be sure and take [10] your gun out of sight so that nobody sees it on your person, because if they see it, that automatically gets you two extra years.

MR. LEVIN: Your Honor, I would hate to be in a position where I am arguing with that type of business, but I think that's the point well made.



THE COURT: I think I certainly understand the point you're making.

Mr. Ingram?

MR. INGRAM: Your Honor, the law that we had to hurdle, and did not successfully hurdle at the trial about whether or not the firearm was carried during, which was not disputed, but was carried in relation to a drug offense, and what I'm about to argue right now will be flying in the face of what I will argue if this is appealed, but the law on that point was that it can be deemed to be carried in connection with the offense if it even just had the potential to facilitate the offense.

So, I think there is nothing inconsistent in the Court finding necessarily that the firearm was carried in relation to the drug offense, but finding that he did not brandish it, that is, display it, for the purpose of intimidating another person, specifically the drug customer. My argument, of course, is premised on two bases: One is the factual case as we're arguing now, and then on the *Jones* analysis, which we haven't gotten to yet. But on the facts, I think it is important that the [11] defendant's brother was there, he introduced them, indicating a comfort level.

This was not a high-anxiety type, back-alley type meeting where you're meeting with somebody you don't know and have no way to know. His stepbrother introduced him, and was there, participated in the conversation. The tape, as I pointed out in my paper, there are voices in the background suggesting there are other people there, and quite often there is a lot of laughter, and if it was anything other than a situation where somebody

from listening to it would conclude that there was some need to intimidate or somebody was intimidated or needed to be intimidated there.

THE COURT: Mr. Ingram, that really is what causes me great difficulty with your side. There can be, in my mind, no doubt but that that gun was there both for legal purposes and illegal purposes, to let everybody know ahead of time I have got a gun here, so there better not be any problems with me.

Now, the fact that the brother brought him in, and so it was a convivial group of people, doesn't make the fact that people dealing in drugs are all nice people. They are not. There are some people who wouldn't hurt a flea, who deal in drugs. But if you're going to deal in drugs, your chances of dealing with violent or bad people are greater than if you don't deal in drugs –

MR. INGRAM: I understand that.

[12] THE COURT: – in my opinion.

MR. INGRAM: And the facts I'm talking about here, I am pointing especially to the conversation about the firearm and the ammunition and what it could do. I think if the Court were looking to that small part of the total conversation and saying therefore he must have been intending to intimidate because he talked about how powerful the ammunition was, I'm putting that into the context of the whole conversation and saying that conversation does not indicate that, because first of all it was an hours conversation. There were other topics discussed. It was a low-keyed discussion. And it was, as the Court pointed out, it was the ATF agent who actually brought



first specific attention to the firearm that led to that conversation.

So, I'm not suggesting, as Your Honor said, that just because it was a low-keyed discussion that he might not have had it, therefore the purpose of dealing with a higher risk drug client, who might have come by at some other time, but just rather to put the discussion about the firearm itself into context.

THE COURT: Let me tell you that I am not going to consider for purposes of whether to enhance or not the conversation about the gun as it was handed over and the bullets, because I am on the assumption that that was asked for by the agent and not voluntarily done by your client. Mr. Levin will have an opportunity, if he feels it appropriate, to contest [13] my assumption, but until he does –

MR. INGRAM: To be fair, I will say that my recollection is not that the agent said something like that's quite a firearm you have got there, let me see it, then the defendant handed it over. I think there was some discussion about guns in general, then the agent pointed or indicated to the firearm saying that's quite a hog leg you have there. That's at the point which the defendant took it out and showed it to him, and maybe handed it over to him. I don't recall that he handed it over to him, necessarily.

THE COURT: Let's first, before we proceed further, there seems to be some question over here. Let's find out what Mr. Levin's position is on that.

MR. INGRAM: All right.

THE COURT: Just that.

MR. LEVIN: With regard to that issue, we're in agreement that Agent Boykin pointed to it, the defendant pulled it out, then the defendant did discuss the power of the weapon.

THE COURT: Then we're on the same track.

Go ahead, Mr. Ingram.

MR. INGRAM: Well, Your Honor, unless you want to proceed into the *Jones* argument, I think I have pointed out what I wanted to about weather [sic] or not the facts of the case fit the definition. Obviously, the definition of "brandish," because there is a definition of it, means there must be some [14] circumstances where a defendant can carry a firearm in relation to a drug offense but not brandish it, and because brandish is defined in the face of every other definition of brandish I have seen. But nevertheless, that's the way Congress chose to define, as displaying it, but they further conditioned that on with this intimidation element.

So, obviously, displaying it, they must have contemplated circumstances where just displaying the firearm would not be – would not fit the definition of brandish. That is where displaying it is not for the purpose of intimidating the person.

THE COURT: All right. By the way, I do want to comment parenthetically that I thought the briefs discussing the *Jones* case, its application and non-application, and the briefs submitted by both sides in this case, were outstanding. Both of you had very good briefs, so I commend both lawyers for doing some hard work here.



MR. INGRAM: Thank you.

MR. LEVIN: Thank you.

THE COURT: Go ahead.

MR. LEVIN: I will pass that along to Mr. Auld from our office.

THE COURT: Whoever did it. I'm giving you credit for it.

MR. LEVIN: Your Honor, if I can just finish up on that last point.

[15] THE COURT: You may.

MR. LEVIN: In fact, a firearm need not even be visible in order for the brandishing definition to apply. And that's in the definition itself, whether the firearm is directly visible to that person.

THE COURT: Give me that section.

MR. LEVIN: It's in 18 USC 924 (c) (4).

THE COURT: Okay. I have got you.

MR. LEVIN: That's where I was quoting, Your Honor. So, just to finish strong, Your Honor, we have the defendant testifying in trial that he wore that weapon to deter would-be criminals. Clearly, that – he had it visible, and he wore it to deter, that should satisfy the definition of brandishing, Your Honor.

If there are no further questions from the Court on that issue –

THE COURT: Let me have your statute book there, one of you.

MR. LEVIN: Your Honor, I may have missed our strongest argument. For purposes of this subsection, "brandish" means to display all or part of the firearm, and that's followed by the disjunctive, or otherwise make the presence known.

Well, clearly it was displayed, and that would seemingly satisfy the definition of brandish. That's the simplest argument.

[16] THE COURT: All right.

MR. INGRAM: As a former English teacher I will have to take issue with that. I think the disjunctive is to display all or part of the firearm or otherwise make the presence known. The [sic] in order to intimidate that person qualifies both of those phrases. It's not to display or to otherwise make the presence known with the intent to intimidate.

That just logically doesn't make any sense. You can display it, or in the alternative you can say I have got the gun in the drawer over here for the purpose of intimidating. For the purpose of intimidating I think, clearly, gramatically, [sic] qualifies both of those phrases.

THE COURT: All right. I do think that it does qualify both of those phrases.

Let's look back at Mr. Harris' testimony dealing with this display. What page is that on?

MR. LEVIN: Your Honor, bottom of page 100.

THE COURT: All right.



MR. INGRAM: Your Honor, I will refer Your Honor to the further discussion between Your Honor and Mr. Harris, beginning on page 103, specifically about that.

THE COURT: As I read the transcript, it was found from the transcript that Mr. Harris carried the weapon at all times in his pawn shop. He carried it in a displayed manner, and he carried it to, in his words, deter people, and in case he needed [17] it.

Where the Court has difficulty, and was evidenced from its line of questioning, was how Mr. Harris could make a distinction between needing it in detering people in the legitimate pawn business and illegitimate drug business. The best answer that the Court could find from Mr. Harris in that connection was, well, I knew that I could not report it to the police if it was trouble with illegitimate work, but I could report it if it was legitimate work.

Giving some credibility to that, not a lot, but some, Mr. Harris was then asked under what circumstances would you use the gun, and he indicated if his life was threatened he had to use it. But then he tried to distinguish between illegitimate and legitimate business, which the Court can find no bright line for if an individual is ready to use the gun in his own protection of his stash, and he said he was, if he is willing to use it in protection of his own – I don't know what he meant by stash, but he did say, in direct answer to one question, I believe, that he would use it to protect his stash. Let me back up and make sure I'm correct on that.

MR. INGRAM: Your Honor, on page 104.

THE COURT: 104.

MR. INGRAM: Line 7. I think it was actually Your Honor who used the word stash, and I think you were using that in contrast to the next question about drugs. So, at least when I [18] heard Your Honor ask that question, I assume by stash you meant his cash.

THE COURT: Okay. I shall find that that was the answer in connection with his legitimate business. Stash is usually not connected to legitimate business. But the line of questioning here would lend credibility to your position, Mr. Ingram.

I will find that that's what that line of questioning was for, Mr. Ingram, and will not hold him to a stricter standard on that. But the line of demarcation between use of the gun for protection of legitimate, as opposed to illegitimate activities, seems to the Court to be one that does not have much credibility. And if the gun is used for emphasizing an intimidation factor, even though it may be for legitimate purposes when it deals with pawn shop activity, it is not for legitimate purposes when it deals with the drug transactions.

I do find that the definition of "brandish" means that, with respect to a firearm, to display any part of the firearm or otherwise make the presence of the firearm known to another person in order to intimidate that person regardless of whether the firearm is directly visible to that person.

I would find that the purpose of this firearm was to intimidate people, to give Mr. Harris control of his activities. Though I think it is a close question on brandishing.



And I will find that he had a legitimate right to have it during his [19] legal business, that he had no right to have it during his illegal business, and that it was there for protection and intimidation. I think it meets the definition that is there. I don't think that is a proper definition, but that's what the definition is under the statute. The Court feels bound to follow that. For that reason – yes, sir.

MR. INGRAM: Your Honor, I don't normally continue to argue after the Court has given an indication of its ruling, but I did want to point out a couple other things, that I think the most important thing that Mr. Harris was telling you, in drawing a distinction between why he was wearing the weapon for the purpose of deterrence in his business and why he was not wearing it for that purpose in the drug sale, was that he repeatedly told you that it's because I was dealing with my friends or somebody that my brother brought to me.

I would hate for the Court to have a concept of "drug transaction" as a generic; every drug transaction is alike. I have represented enough people, and spent ten years on a university campus working, to know that there are networks of people who buy marijuana, and buy enough to get some to sell to my friends, or get some at the same time, and just situations that are not your typical high-risk drug transactions.

I think there is a distinction in some – to call this a drug transaction, I think, is to do disservice of the reality of what was going on here. Also, he testified that – if you [20] remember, there was testimony that most of the drug transactions took place in his home. It was only on rare

occasions that one of his friends, who he was buying for and selling to, would come by – call him and say can I come by the shop and pick it up. And there was testimony, and nothing to contradict this, that in all of the other drug transactions that took place outside the shop, which was the majority of them, there was never any firearm there.

So, I think that also gives credence to his assertion that I was wearing the firearm in the shop to protect my business. It never occurred to me to use the firearm in relation to a marijuana transaction because I was dealing with my friends, just like I was dealing with them at home or somebody that my brother brought in, so I had a comfort level.

So, I think the fact that – recognizing the fact that there are some situations that are, in fact, low key transactions among friends or acquaintances, as distinguished from a true high risk, as I referred to earlier, a back alley deal with somebody you have never dealt with before in the first place, much larger amounts than we are talking about here, we're talking about basically user amounts, large user amounts, but nevertheless user amounts here, and the fact that the evidence was uncontradicted that he had never even carried a firearm outside of a shop.

The evidence was that everybody who testified said when [21] he left in the evening he would lock it up. When he came in in the morning he would put it on. Never seen a firearm in his home. He even had one young man who bought marijuana from him and said I bought it from his home and he never had a firearm there to my knowledge. So, I know Your Honor may have



already made a decision, but I feel like I would be remiss if I didn't point out those factual matters.

THE COURT: I understand those distinctions that you're trying to make, Mr. Ingram, but I have a real problem in – I guess you must concede that it was there for intimidation purposes for people who did not act properly in the pawn business.

MR. INGRAM: He admitted that.

THE COURT: And he certainly admitted that.

MR. INGRAM: But he repeatedly denied, when asked by Mr. Levin or Your Honor, and perhaps even me, that he ever even considered using the firearm in relation to any marijuana transaction.

THE COURT: I'm not so sure that was a free-use decision, rather than I never had reason to use it in the drug transaction. I'm not sure that he said, and I don't think he did say, I thought about this thing, and I decided I didn't need to use this gun in my drug transactions. I would find that sort of difficult to accept myself. I think what he was saying was I never had to use it, so I never considered using it during the [22] drug transaction, and that's different from saying I preconceived that I would not use it during the drug transaction.

MR. INGRAM: No, Your Honor, I don't think he necessarily would have said I had thought about it ahead of time and decided I would never use it in a drug transaction. I think what he would say, and the implication of what he testified to would lead to the conclusion his position is that it never occurred to me. I deal with my friends.

THE COURT: To use it.

MR. INGRAM: To use it in a drug transaction. Never occurred to me, because I sell marijuana to people at home. I don't carry a firearm there. Never occurred to me to carry a firearm there. I occasionally sell it to somebody who comes by the shop, but it never occurred to me that – it's almost like I'm unaware I have this firearm on in relation to a drug transaction.

THE COURT: But how can I turn it on and off, Mr. Ingram? If I am wary of you, because you look to me like a violent person, so before I meet you I decide I'm going to strap a .45 on my side and then go argue with Bill Ingram, if he gives me any trouble he will see that gun. Now, that's intimidation. And then I see Mr. Levin, who I know has never struck a lick at anybody, he is Mr. milk toast in dealing with people, but I have a problem with him right after I talk with you, so I argue with [23] him. Is that not there for the purpose, the same purpose to which it was originally put?

MR. INGRAM: I would still say you're carrying the firearm for the purpose of intimidating me, but it seems to me you have just admitted I'm not carrying the firearm to intimidate Mr. Levin, because he is Mr. milk toast, which I think we can all take recognition of.

THE COURT: If Mr. Levin decides to swing and I do not use –

MR. INGRAM: I think you can give any hypothetical where you can say, for example, one of these people was his friend. You can ask a question that says you're dealing with your friends, and that's why, if you



had happened to not have on your firearm in the shop if one of them came by, but then one of them pulled out a gun, wouldn't you have wanted to have it on, or if you had it on wouldn't you use it? It's a hypothetical, but would never happen in his mind.

You can always give a hypothetical in some situations where the completely unexpected happens, that if you had a firearm you would use it, or if you had a stick you would use it, but that is a hypothetical. And I think what we're talking about is whether or not he brandished for the purpose of intimidation or displayed, as it's defined, for the purpose of intimidation in these particular transactions, not hypothetically what if a 6'5", 240 pound guy, wearing two [24] six-guns came in and asked about buying marijuana, wouldn't you have relied on your firearm. Under those circumstances, I probably would say yes, but that's a hypothetical. That's not what happened here.

THE COURT: The only thing that happened here is he had it during the drug transaction. That's all we have here.

MR. INGRAM: Right. And I think, as I said earlier, there is nothing inconsistent in the Court concluding it on the matter of guilt or innocence that the firearm was carried in relation to the drug crime, that is, because it had a potential; at a minimum, what the Court could find to base a finding of in relation to, or in connection with, that it had the potential for that.

And you are talking about hypothetically, but under the guidelines, where there is a different definition, I think Your Honor is limited to consideration of whether

or not he displayed this firearm in these circumstances for the purpose of intimidation in the drug sales in question here.

THE COURT: All right. I think it is a close question, Mr. Ingram, and I certainly see the argument that you're making. I have a hard time drawing a bright line between one who is engaged in legitimate ways of carrying a gun for intimidation, for those purposes, and turning it off for intimidation purposes if there is an illegitimate, illegal activity going on.

You have got additional support on your side in that it [25] was not used outside this place. There is no evidence that it was ever used there. But the evidence is that it was there during the drug transaction, and I don't think that he turns off his intent to use it for intimidation and authority simply because in this case I think I trust this guy.

MR. INGRAM: If I may give just one more example that occurs to me.

THE COURT: Sure.

MR. INGRAM: Hypothetically, people come in every month or so asking can I put a poster up in your window about my particular event. And they're not there to transact business, they're there purely for the purpose of asking can I put a poster up. I think he would say no way was I wearing a firearm to deal with people like that. Somebody who comes in just –

THE COURT: What if the man had said I don't care what you say, I'm putting it up anyhow, and the only way you're going to get me out of here is whip me?



MR. INGRAM: I was going to say suppose one of those people came in and got so angry that he couldn't put it up that he attacked him? Obviously, he would use it if he had to. That's a hypothetical that is so far at the end of reality of what might happen.

I mean, I am simply saying there could be an example under any circumstances, if you testified that my mother comes to my home frequently, and I would never use a firearm against [26] my mother. Well, what if she pulled out a bat and swung it at you? Well, yeah, I guess I might under those circumstances. But there isn't a hypothetical under any factual scenario I can think of where you can't say but what-if. And obviously, the answer could be sure, I might use a firearm under those farfetched, but nevertheless – and improbable, but nevertheless possible hypothetical facts.

THE COURT: All right. I certainly understand the argument, Mr. Ingram, and I think it's an impressive argument, as well as your paper, but I will have to find that my reading of this would include brandishing as carrying an exposed weapon during the transaction, and I will so find.

Now, is there another objection that you have?

MR. INGRAM: Your Honor, I objected to the denial of acceptance of responsibility under the calculation of the guidelines of the presentence report, that would take Mr. Harris from a level eight, criminal history category one, zero to six range, to a level six, zero to six range. So, it's almost – it is pretty much irrelevant under those circumstances, but I pursued that because Mr. Levin is asking that more drug amounts be attributed to

him, and it would have significance if the Court agrees with Mr. Levin on that.

THE COURT: Okay. Let's talk about that then, Mr. Levin.

MR. LEVIN: Your Honor, as addressed in the position paper, the defendant at trial acknowledged that he had been [27] purchasing between 8 to 10 – had purchased between 8 to 10 pounds – 8 to 12 pounds of marijuana over a six year period. And I argue in the position paper that this is attributable drug weight to the overall computation.

THE COURT: In that it should be used to calculate what?

MR. LEVIN: Well, it's relevant conduct to the overall conduct of the defendant, in that he was purchasing – he was selling drugs from his pawn shop. Granted, I have to admit that I did not flesh it out or elaborate on it as well as I might have at trial, and certainly it came from the defendant's lips that he had dealt between 8 to 12 pounds of marijuana over a six year period. He did not say that he sold it from the pawn shop. It wasn't that clear, and I didn't pursue that. In fact, I have quoted the detail in my position paper, and that's the detail – that's as detailed as I got at trial. I think it's a legitimate argument.

THE COURT: I do, too. I think it's very close, and it's certainly a legitimate argument. All right, sir.

Mr. Ingram, I will hear you on that.

MR. INGRAM: Your Honor, those two questions and two answers are on page 90, at lines 1 through



9. It certainly is not – the testimony is not a direct question, how much marijuana have you sold or purchased in the last six years, definitely eight to 12 pounds. There is – it is nowhere near that unequivocal.

[28] The answer initially is "I don't know," followed by "Probably, I would say, between 8 and 12 pounds total." And that, alone, is pretty equivocal about how much it was.

Then the next question is, "How many times have you visited these individuals," that is, the people that you were selling to? And again, he said, "Not – rarely. It was a monthly, bi-weekly, every other week sometimes. I wouldn't get that much, though. So, really, if you add it up, it wouldn't – it wouldn't be that much."

So, at that point, it appears to me he is saying it wouldn't be 8 to 12 pounds. That is so sketchy and speculative that I think the Court cannot, even if the Court determines that sales outside of the pawn shop are relevant conduct, that that is too speculative to base an amount on that's going to kick somebody's guidelines up by four levels. It might have been clearer had there been follow-up questions about getting a more definite statement about how many times did you sell to this person, and how many times did you sell to the next person. On average, what quantity did you sell to this person, and to the next person. But you don't have that; you don't come anywhere close to that.

THE COURT: All right, sir. Mr. Levin, what do you say as to this line of questioning? Well, what do you say if the answer here is, well, I bought 8 to 12 pounds of marijuana from Sam Smith sometime during the last four

years for my personal [29] use? If that was said, would that be something that you would be saying should be calculated?

MR. LEVIN: If the argument is that the relevant conduct is conduct which is similar to that which is charged –

THE COURT: Which is selling.

MR. LEVIN: Which is selling. – then the answer would have to be no.

THE COURT: How do we know what the question was zeroing in on and what the answer was to?

MR. LEVIN: The best I can argue, Your Honor, is that he acknowledged purchasing between that weight, and he acknowledged selling to at least four people, and then when confronted with the fact that it was more than four people, he acknowledged it was at least six people.

THE COURT: Got up to six or seven people that he had sold to. Okay. How much did he sell?

MR. LEVIN: Well, we agree it was a small – it was user amounts, at least over a three-year period, he acknowledged.

And I'm trying to find where he acknowledged – at some point he did say monthly, bi-weekly, every other week, over a three-year period. That's what the defendant acknowledged.

THE COURT: All right. I will give you an opportunity to put that in there. Where is that?



MR. LEVIN: That's on page 90, Your Honor. I have to make sure I'm –

[30] THE COURT: "Question: How many times have you visited these individuals?

"Answer: Not – rarely. It was a monthly, bi-weekly, every other week sometimes. I wouldn't get that much, though. So, really, if you add it up, it wouldn't be that much."

MR. INGRAM: Your Honor, if you look on the previous page, the previous question was who were you buying it from. Then he asked who do you purchase it from. How much did he purchase from the individuals you identified.

THE COURT: Isn't that referring to – go ahead.

MR. INGRAM: In his answer, Mr. Harris says, "I wouldn't get that much, though." So, I think he is still thinking in terms of who he bought it from.

THE COURT: Isn't that responding to purchases?

MR. LEVIN: It is, Your Honor. I wasn't reading it correctly. And I acknowledge it is all not together clear.

THE COURT: I certainly understand it, and I think that is an appropriate thing to raise. I'm going to find that that is not to be calculated, because it is not sufficient from which the Court can find that it is similar conduct. It may very well be, but I just don't have quite enough to make that determination.

Therefore, under the revised report now that has been prepared, I guess I made findings that are consistent with your findings, is that right, Mr. Wright?

[31] THE PROBATION OFFICER: Yes, sir.

MR. INGRAM: Your Honor, on the acceptance, while I acknowledge it leaves him in the same guideline range, I think I would like Your Honor to rule on that. I am asking for that, and I don't need to elaborate on the argument I made that it comes within the exceptions of the guidelines that talk about not contesting factual guilt, but contesting you are admitting conduct to the applicability of the statute, which I .say is what we were doing here. That is, by going to trial on the 924(c) count we're talking about acceptance of responsibility of the marijuana count, and he fully admitted.

THE COURT: I understand.

MR. INGRAM: The reason I'm pursuing that, even though it's the same guideline range, I have no idea whether your offense level affects you in any way within the Bureau of Prisons, but I have had things before come up that I did not contest because it didn't affect the guidelines, and clients call me and say we should have done this because it's keeping me from this program or whatever. So, because I do think under the guidelines he has accepted responsibility, I'm asking the Court to rule on that.

THE COURT: Mr. Levin, what do you say?

MR. LEVIN: Your Honor, I don't believe the defendant is entitled to acceptance of responsibility. I'm sorry, Your Honor.



[32] THE COURT: This is very hard to hear.

MR. LEVIN: Our position is that the defendant has not accepted responsibility.

THE COURT: Okay. I think I would have to agree with that. I think there has not been acceptance of responsibility, and this does not come within the exception.

That leaves us in the position, as I see it, that your client is in the offense level of eight, and a criminal history category of one, which on Count 1 calls for zero to six months, and Count 2, seven years consecutively, and two to-three years on Count 1 of supervised release, three to five-years on Count 2, up to $20,000 of fine, $250,000 in community restitution, $200, or $100 on each count, for the special assessment.

Do you agree, reserving your right to contest matters at other places, do you agree that's what we're dealing with here?

MR. INGRAM: I do, Your Honor.

THE COURT: Then I will adopt the presentence report prepared by Mr. Wright. Any evidence?

MR. INGRAM: No, Your Honor.

THE COURT: Mr. Ingram, as I hear from you on this, I want you to know that of all that took place in this case, the most egregious comment and thing that this Court deals with is a statement made by your client about what would happen to a police officer.

MR. INGRAM: I understand that. And, Your Honor, I can [33] only say that from having listened to the

entire tape, and having talked to my client, and heard his testimony, he was not saying, and if a police officer came in here I have the ability to kill him. He was saying, by way of example, here is how powerful these bullets are. He could have given an example of these things will go through a concrete block, but he was giving the example of probably the most commonly known deterrent to a bullet, that is a bullet proof vest; he is saying it would penetrate it, it will go all of the way through.

I don't think it's as malevolent as it sounds at first blush. I understand different people might hear that differently, but from having talked with him about that, the fact that he knows police officers, he is good friends with the one who came by periodically to check the pawn tickets, a female officer who he knew, I hope Your Honor will not, with what little discretion you have, sentence him to more than seven years. There is not much more you can do up there, but I would not consider that as egregiously as Your Honor apparently is.

THE COURT: I do feel like that is substantial. I think that people talk sometimes, but to put that – whatever you say about a specific group, just is very difficult. It could have been lawyers, judges, police officers, whoever. It just seems like a terribly egregious comment to make, it really does.

MR. INGRAM: He certainly regrets making it now.

THE COURT: I bet he does.

[34] MR. INGRAM: And, of course, judges and lawyers don't wear bullet proof vests, typically. I guess



he could have given an example of a U.S. soldier wearing a bullet proof vest, perhaps, but he was really talking about a bullet proof vest, not who was wearing it, and what it would do to the general group that wear the bullet proof vest.

But having said that, there is not really much, more that I want to say, because there is so little that the Court can do. We have already moved from a five year mandatory minimum to a seven year.

I think the gravamen of this case was the firearm. I think Mr. Levin said to me at one point that this drug case would not be here in federal court but for the fact that ATF was disturbed that marijuana sales were being sold out of a place where he had a firearm license. So, I think it is the firearm that is the gravamen here, and he is going to get seven years for that.

THE COURT: I'm sure that's true.

MR. INGRAM: And I would have asked Your Honor to do something a little unusual, but I have learned that I can't. I was going to ask Your Honor to give him probation on the zero to six month range for the drug offense, and have that probation run concurrently with his supervised release term on the seven year term of imprisonment.

I have since learned, and actually didn't notice in the [35] presentence report, but I have noticed since then by statute you can't do that. You can't impose probation on one offense when you're simultaneously getting an active term of imprisonment on another offense. But because you can't do that, and because if you could do that it

would not affect anything other than six months, it wouldn't affect the supervised release term if you gave him six months and gave him a supervised release term, I feel like Your Honor would have the supervised release term to run concurrently.

THE COURT: Yes.

MR. INGRAM: So, it's not going to affect that. So, I'm going to ask for something a little more unusual, and that is give him zero, or give him time served. He was arrested for – can't remember whether it was a day or two days, or whatever it was, but we just don't ever see a sentence at zero to six imposed at the low end of that without probation. But the guideline certainly contemplates you can do that. You don't have to impose probation. Here it would sort of be a useless and actually a legally impossible – it would be legally impossible to do that under the definition of the statute.

So, I'm asking Your Honor to give him either time served or zero on the drug offense, and then there would be no need to impose a supervised release term if you give him zero. If you impose time served, you can impose the term of supervised release to run concurrently with the term of supervised release [36] on the other offense. Seven years, I think, is what the attention should be focused on in this case, that is, the firearm.

And that's where the Government I think was coming from. And now that we have moved from a five year to a seven year on a term that has convinced me that if Congress wants to they can define night as day. I guess I have always heard two things you don't want to watch being made, sausage and law, and maybe this is one of



those examples for me. Maybe each would be less palatable if you observed the process. In any event, that's what I'm asking Your Honor to do.

THE COURT: Thank you, Mr. Ingram. Mr. Levin, I will hear from you, sir.

MR. LEVIN: Your Honor, briefly, if I may. I just want to make two points, which are points I'm sure the Court is well aware of, but I want to emphasize their importance.

Your Honor, the defendant, although he is facing one charge, and he faced one charge, the 924(c) count at trial, he; could have faced four counts, four 924(c) counts.

The testimony in the presentence report established that on four separate occasions he sold marijuana to Special Agent Boykin while brandishing a firearm. He has not been convicted of those four counts, instead the Government proceeded with just one count. His sentence would have been much longer, 20 years, I think, for the additional firearm counts. He is not facing [37] that. He is facing a mandatory minimum of seven years.

And I think that's an important point to make, Your Honor, that we're not here to see that the defendant goes to jail at the cost of his entire life, but firearm possession is serious; that possession with the sale of drugs is a serious matter, and he should be sentenced for both, for that sale of marijuana, and we would argue for the high end, six months, and then a mandatory minimum of seven years.

The fact that he made a comment about the penetrability of that bullet through a bullet proof vest, Your

Honor, he didn't say just a bullet proof vest, he said a police officer or cop. And when he went outside that pawn shop to sell marijuana to Agent Boykin, he carried his weapon. He moved his car around in a circular fashion so it was facing the street. The logical inference there is that he was protecting himself, carrying a weapon, making a drug sale. Who was he expecting? Perhaps it was law enforcement.

He put himself in a position where he could have used that weapon, and he had already evidenced what that weapon was capable of doing. That is a serious crime, Your Honor, and I will end with that. Thank you.

THE COURT: Thank you. It's very serious about the gun. I have no question about that.

I now give to you, Mr. Harris, an opportunity to be heard, if you wish to. You should know that you are not [38] required to say anything, and if you don't say anything it will not be held against you. However, this is serious to you, and if there is anything you want me to hear from you, in addition to what Mr. Ingram has already ably done for you, I will be glad to hear it.

THE DEFENDANT: No, sir.

THE COURT: You don't have anything?

THE DEFENDANT: No, sir.

THE COURT: All right, sir. Step up here, gentlemen, please.

(Bench conference on the record:)

THE COURT: It is my feeling that seven years is sufficient time to give this man, although, if under the



gun case it was more time, I might consider that, I don't know. But I think this is a gun case, and the seriousness of it is what he said.

I know your position on that, Bill, but you just don't mention those kind of things unless they have occurred to you, maybe not to do anything, but it's just something that he has got to wake up and realize you don't do. I think the question of brandishing, obviously, I would think, or I wouldn't rule that way, is proper, but I think it's a close case whether he brandished it or not. It bothers me to move from a legal possession of it to suddenly an enhancement for the same thing that was otherwise legal.

[39] As I expressed earlier, I think that's what the statute says, though, and I am comfortable that I'm right. So, if there is an appeal on that case, and I'm wrong on that, as I have been wrong before on other things, it wouldn't shock me, but I do want you to know that what I do on this case is to try to get a particular amount of time so that if he wins on the brandishing, as I see it, both would come back and I would reopen the first count again, because that's what I was looking for. I think I have authority to do that.

But I just tell you all ahead of time what my thoughts are. If I'm wrong, I just accept it that I'm wrong, whether I can do it or not. But I do think that seven years is sufficient to accomplish what needs to be accomplished in this case. So, if the judgment is fashioned, and you win it in the Court of Appeals, do not be surprised if I come back and say I can now resentence on both of these counts.

MR. INGRAM: I won't be surprised. I don't know what my position will be on that.

THE COURT: I'm not asking you for your position, I'm just telling you where I'm coming from.

MR. LEVIN: And I don't know if the Court is willing to do this, if I may suggest, it's a mandatory minimum of seven years. Obviously, if Mr. Ingram had prevailed it would have been a mandatory minimum of five years. Only the Court is willing to say that even if it had been a mandatory minimum of [40] five years, the Court would have sentenced the defendant to seven years, and that might obviate the need to have the case – if the Court's position is wrong, and would obviate the need for it to come back, because the Court's position would be that he would have gotten seven years.

THE COURT: I could have given him seven years?

MR. LEVIN: Sure, it's a mandatory minimum.

MR. INGRAM: No, it's a mandatory sentence.

THE COURT: It's a mandatory sentence.

MR. INGRAM: It's not shall be sentenced to five or more?

THE COURT: No, it's five. No, it says not less than five years.

MR. INGRAM: Okay.

THE COURT: Not less than five years.

MR. INGRAM: Well, Mr. milk toast is right.



THE COURT: Sorry about using that illustration.

I'm not sure of what I will do about that. I will simply say at this point that I believe the seven year sentence is appropriate, and I will go from there on what I will do if Bill wins it somewhere else.

MR. LEVIN: Thank you, Your Honor. May I retrieve my statute book?

THE COURT: You may have it back.

(Bench conference concluded).

THE COURT: This Court finds that for the circumstances [41] with which the Court has to work, that a sentence of seven years is appropriate, and that is in considering all of the aspects of this case, both charges, the one to which he has pled guilty and the one which he has not. So, the Court has tried to fashion a judgment in the case that will, in fact, recognize that, and the Court will be guided accordingly.

It is adjudged that on Count 1 the defendant shall be committed to the custody of the Bureau of Prisons for a period equal to the time that he has already served, which the court deems to be two days, whatever time it may be for the time served.

On Count 2, it is ordered that he shall be committed to the Bureau of Prisons for a period of seven years.

On Count 1 and Count 2, he shall be on supervised release for a period of three years on each count, which shall run concurrently with each other.

The Court has reviewed the imposition of a fine within guideline range and has determined that the defendant has the ability to pay a fine, and that he has been in business, and is skilled, and can continue his skills after learning additional skills while he is in custody. Therefore, a fine within the guideline range of $3,000 is imposed. There is a special assessment of $100 on each of the two counts, for a total of $200, which shall be paid.

Mr. Ingram?

[42] MR. INGRAM: Your Honor, we request that he just be allowed to pay that out of the Inmate Financial Responsibility program.

THE COURT: The $200 is due and payable immediately, and shall be paid at such times and in such amounts as the Bureau of Prisons, through the Inmate Financial Responsibility Act, may direct.

The conditions of supervised release are, one, that he shall abide by the standard conditions of supervised release; two, he shall cooperatively participate in any substance abuse treatment program, which may include drug testing, it may include in-patient or residential treatment, and if such treatment is directed, then during the time of that treatment he shall abstain from the use of alcoholic beverages, that is, if the treatment is directed by the probation office.

Three, the fine which is imposed here shall be paid beginning 30 days after his release from imprisonment, and he shall make then the payment of $85, and a similar



sum shall be due and payable each month, each calendar month thereafter, while he is on supervised release.

Mr. Wright, is there anything I haven't covered?

THE PROBATION OFFICER: No, sir, Your Honor.

THE COURT: Mr. Ingram, is there anything that you can think of that we have not covered?

MR. INGRAM: Not in terms of sentence, Your Honor. I do [43] request that Your Honor recommend placement as close to North Carolina as possible. And because Mr. Harris has been out on pretrial release without any incident up to this time, I'm asking that you allow him to self-report and give him a reporting date.

MR. LEVIN: Your Honor, I would ask that he be taken into custody today. There are several indictments that are pending apparently in state court. They haven't been able to serve them to the defendant, the state authorities. I feel like the information I have is he has been avoiding them.

THE COURT: Do I have any authority to let him stay out absent unusual circumstances since there is a conviction here of a drug case and the gun case? I'm not sure I have authority to let him stay out absent request of both parties, in the exceptional circumstances. You may look at it, 3143. Look at that.

MR. INGRAM: Your Honor, under 3143, it says that – it cross references 3142(f)(1), the detention statute, and that refers to a drug offense that is punishable by ten years or more, the maximum here is five years. So, if he were convicted of a drug offense, punishable by ten years

or more, you would have to take him into custody today, absent the circumstances outlined in the statute.

THE COURT: Do you agree with that?

MR. LEVIN: I do agree.

[44] THE COURT: Thank you for bringing that to my attention. Have there been any reports of failure to comply with the pretrial release?

MR. INGRAM: None that have been reported to me, Your Honor. He has been – he knows he has been told there are some warrants outstanding for him. He has spoken to me about that.

THE COURT: I'm not concerned about those right now.

MR. LEVIN: Your Honor, I'm getting information that he has not brought certain things to his probation officer in Charlotte. I'm in the process of finding out more details, but I have not spoken directly with the probation officer other than initially when the Court told me to contact him.

THE COURT: I don't remember doing that. I did?

MR. LEVIN: You did. You directed me to contact the, probation officer in Charlotte and let him know who I was, and if there were any incidences he should contact me. He has not contacted me to report any incidences, but apparently there has been a problem. I'm trying to find out.

THE COURT: Did you tell the probation office in Charlotte to notify you if there were any problems?



MR. LEVIN: I did, Your Honor.

THE COURT: All right. Then at this point that answers my question. Now, if there are problems, they may be brought to your attention, Mr. Levin, and I will amend and change where we are at this point. But at this point he is on pretrial release, [45] and has abided, so far as we know in this court, by the terms and conditions set forth. For that reason, the Court is going to give him a date of March the 30th, 2000, to report to the institution to which he is assigned.

Now, are you telling me that there are outstanding warrants for him now?

MR. LEVIN: There are, Your Honor.

THE COURT: What county?

MR. LEVIN: Stanly County.

THE COURT: Stanly?

MR. LEVIN: Yes, sir.

THE COURT: All right. Where does he live?

MR. INGRAM: In Anson County.

THE COURT: Anson County. What day do you want to meet Mr. Harris for those warrants?

MR. LEVIN: Your Honor, we have them now. We can serve them today.

THE COURT: All right. Serve them today while you're here. I was going to set a date that would be convenient for them, and convenient for Mr. Harris to be there, so that that can be a condition, but if they have

them with them, there's no reason they can't serve them now.

MR. LEVIN: We can do that today, Your Honor.

THE COURT: That will take care of that part of it.

MR. LEVIN: Your Honor, if we find out there has been a [46] problem –

THE COURT: You may bring it. I was going to mention that.

Mr. Ingram, I understand they have those warrants to serve on him at this time, and I see no reason why they can't do that.

Now, Mr. Harris, I'm about to release you under the same terms and conditions that you are already under release. So, those conditions remain in full force and effect. I have no idea, and as far as I know you have abided by every condition that you were required to abide by, or I think this Court would have been notified, but you are being released until that day of March the 30th, on the condition that the probation office does not bring anything to Mr. Levin's attention that might affect that, that is, the extent to which you have violated any of those conditions. If you have, then I reserve the right to bring you back in at that time.

I'm not trying to threaten you, I'm just trying to let you know that you are released at this point, and I hope that everything is fine until March the 30th. But be aware that any violation, either past violation or violation in the future, may cause a revocation of that release order. You understand that?



THE DEFENDANT: Yes, sir.

THE COURT: Anything else, then, Mr. Ingram?

MR. INGRAM: No, Your Honor.

[47] THE COURT: Mr. Harris, you have an absolute right to appeal what has been done. If you're unable to afford an attorney to represent you, upon your motion the Court will appoint someone to represent you on that appeal. Listen to Mr. Ingram, who will give you his best advice on whether you have any successful chance for an appeal. Whatever Mr. Ingram may say, it is still your decision whether you wish to appeal, but if you're going to, you have got to get that notice in within ten days of the entry of the judgment or you would lose that right. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Thank you, sir. Good luck.

MR. LEVIN: Thank you.

THE COURT: Thank you, Mr. Levin. Let's recess until two o'clock.

(Sentencing hearing concluded.)

* * *

[48] CERTIFICATE

I, MARY JO BECK, CSR, RPR, RMR, United States District Court Reporter for the Middle District of North Carolina,

DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of the proceedings had in the within-entitled action; that I reported the same in stenotype to the best of my ability; and thereafter reduced same to typewriting through the use of Computer-Aided Transcription.

Date: 5-4-00 /s/ Mary Jo Beck
Mary Jo Beck, CSR, RPR, RMR
Official Court Reporter

---



**United States District Court**
**Middle District of North Carolina**

UNITED STATES OF AMERICA

v.

WILLIAM JOSEPH HARRIS

**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)
Case Number: 1:99CR191-1
Defendant's Attorney: William C. Ingram
Assistant Federal Public Defender
(Filed February 28, 2000)

**THE DEFENDANT:**

[X] pleaded guilty to count 1s.

[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.

[X] was found guilty on count 2s after a plea of not guilty.

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21:841(a)(1) & (b)(1)(D) | Distribute marijuana. | 04/30/99 | 1s |
| 18:924(c)(1) | Carry firearm during drug trafficking crime. | 04/30/99 | 2s |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)

[X] Count(s) 1-2 and 3s-4s are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, costs, and special assessments imposed by this judgment are fully paid.

Defendant's SSN: 245-37-1204
Defendant's DOB: 07/07/77
Defendant's USM #: 20775-057
Defendant's Residence Address:

Highway 52 North
Post Office Box 164
Ansonville, N.C. 28007

Defendant's Mailing Address:
(if different from residence address)

February 17, 2000
Date of Imposition of Judgment

/s/ William L. Osteen
Signature of Judicial Officer

William L. Osteen, United States District Judge
Name & Title of Judicial Officer

February 23, 2000
Date



**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **seven (7) years.**

**[Under Court 1s, defendant committed to the custody of Bureau of Prisons for a term of time served, and seven (7) years under Count 2s to run consecutively to the sentence imposed under Count 2s]**

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[X] The defendant shall surrender to the United States Marshal for this district.

[X] at 12:00 noon on 3/30/2000.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 pm on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY _____
DEPUTY US MARSHAL

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years.**

**[Three (3) years under Count 1s, three (3) years under Count 2s to run concurrently with Count 1s].**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.



[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable).

[X] The defendant shall not posses a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated).

## STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.



## SPECIAL CONDITIONS OF SUPERVISION

The defendant shall cooperatively participate in a substance abuse treatment program, which may include drug testing or inpatient/residential treatment, as directed by the probation officer. During the course of treatment, the defendant shall abstain from the use of alcoholic beverages.

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| **Totals** | **$200.00** | **$3,000.00** | **$** |

[ ] If applicable, restitution amount ordered pursuant to plea agreement: $

## FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the 15th day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

## RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

| Name of Payee | **Total Amount of Loss | Amount of Restitution Ordered | Priority Order or % of Payment |
|---|---|---|---|
| Totals: | | $ | $ |

** Findings for the total amount of losses are required under Chapters 109A, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.



## SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payments of the total fine and other criminal monetary penalties shall be due as follows:

A [ ] in full immediately; or

B [X] $200.00 immediately, balance due (in accordance with C, D, E, or F); or

C [ ] not later than _____; or

D [ ] in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the US probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ *(equal, weekly, month, quarterly)* installments of $_____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment; or

F [X] In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of the term of supervised release, the defendant shall make payments in equal, monthly installments of $85.00 to begin 30 days upon release from imprisonment and every 30 days thereafter until paid in full.

The court will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution (18 U.S.C. § 3664(k)).

**The $200.00 special assessment shall be collected by the Federal Bureau of Prisons through the Inmate Financial Responsibility Program.**

[ ] Joint and Several

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District court for the Middle District of North Carolina, P. O. Box 2708, Greensboro, NC 27402, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

**STATEMENT OF REASONS**

[X] The court adopts the factual findings and guideline application in the presentence report.



**OR**

[ ] The court adopts the factual findings and guideline application in the presentence report except:

**Guideline Range Determined by the Court:**

**Total Offense Level:** 8

**Criminal History Category:** I

**Imprisonment Range:** 0 to 6 months on count 1s and count 2s seven (7) years, consecutively.

**Supervised Release Range:** 2 to 3 years on count 1s and 3 to 5 years on count 2s.

**Fine Range:** $2,000.00 to $20,000.00

[ ] fine waived or below the guideline range because of inability to pay.

Total Amount of restitution: $ n/a

[ ] Restitution is not ordered, because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title

18, restitution is not ordered, because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

**OR**

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s);

**OR**

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

---



IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | No. 1:99CR191-1 |
| vs. | : | |
| WILLIAM JOSEPH HARRIS | : | |

NOTICE OF APPEAL

(Filed Feb. 18, 2000)

Comes now the defendant, by and through his undersigned counsel, and hereby gives notice of appeal to the Fourth Circuit Court of Appeals from the judgment and sentence imposed by the United States District Court for the Middle District of North Carolina on February 17, 2000.

Respectfully submitted, this 18th day of February, 2000.

/s/ William C. Ingram
WILLIAM C. INGRAM
First Assistant Federal Public Defender
North Carolina State Bar #9884
101 S. Elm Street, Suite 210
Greensboro, NC 27401
(336) 333-5455

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing on the below-mentioned attorney by mailing a copy of the same to the following address:

Mr. Steven H. Levin
Assistant United States Attorney
P. O. Box 1858
Greensboro, NC 27402

This, the 18th day of February, 2000.

/s/ William C. Ingram
WILLIAM C. INGRAM
First Assistant Federal
Public Defender

---



**PUBLISHED**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

---

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* | ) | |
| v. | ) | No. 00-4154 |
| WILLIAM JOSEPH HARRIS, *Defendant-Appellant.* | ) | |

---

Appeal from the United States District
Court for the Middle District of
North Carolina, at Durham.
William L. Osteen, District Judge.
(CR-99-191)

Argued: January 25, 2001
Decided: March 20, 2001

Before MICHAEL and MOTZ, Circuit Judges,
and Robert E. PAYNE, United States District Judge
for the Eastern District of Virginia,
sitting by designation.

---

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Michael and Judge Payne joined.

---

**COUNSEL**

**ARGUED:** William Carlton Ingram, Jr., First Assistant Federal Public Defender, Greensboro, North Carolina, for

Appellant. Steven Hale Levin, Assistant United States Attorney, Greensboro, North Carolina, for Appellee. **ON BRIEF:** Louis C. Allen III, Federal Public Defender, Greensboro, North Carolina, for Appellant. Walter C. Holton, Jr., United States Attorney, Greensboro, North Carolina, for Appellee.

---

**OPINION**

DIANA GRIBBON MOTZ, Circuit Judge:

After convicting William Harris of carrying a firearm in relation to drug trafficking, the district court found that he had "brandished" the firearm and sentenced him in accordance with 18 U.S.C. § 924(c)(1)(A)(ii) (Supp. IV 1998). Harris appeals, contending the court erred by increasing his sentence for brandishing the firearm, which he maintains constitutes an element of the offense that must be charged and proved beyond a reasonable doubt. Examination of the statutory language, structure, context, and history of § 924(c)(1)(A) leads us to conclude that "brandished" is a sentencing factor, not an element of the offense. Accordingly, we affirm.

I.

Harris owns a pawn shop in North Carolina. On April 29, 1999, an undercover law enforcement agent accompanied a confidential informant to Harris's shop. After talking with Harris, the agent purchased a small quantity of marijuana and returned the next day to purchase an additional 114 grams of marijuana.



During both transactions, Harris carried a 9mm Taurus handgun in an unconcealed hip holster. According to the agent's testimony, Harris, at one point, removed his firearm from its holster and explained that it "was an outlawed firearm because it had a high-capacity magazine," and further stated that his homemade bullets could pierce a police officer's armored jacket.

Harris was subsequently arrested and indicted on two counts of distribution of marijuana, 21 U.S.C. § 841(a)(1) & (b)(1)(D) (1994 & Supp. IV 1998), and two counts of carrying a firearm "in relation to" drug trafficking in violation of 18 U.S.C. § 924(c)(1)(A). The government dismissed one distribution count and one firearm count. Harris pled guilty to the other distribution count, but proceeded to a bench trial on the remaining § 924(c) count of carrying a firearm in relation to the April 30 drug trafficking incident.

At trial, the district court found that Harris carried the handgun in relation to a drug trafficking offense and convicted Harris of violating § 924(c)(1)(A). At Harris's sentencing hearing, the judge determined that he had "brandished" the gun within the meaning of § 924(c)(1)(A)(ii) & (c)(4) and consequently sentenced Harris to the mandatory minimum of seven years imprisonment prescribed by the statute. Harris now appeals.

II.

Section 924(c)(1)(A) provides in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking

> crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A). Harris principally contends that the "brandished" clause, 18 U.S.C. § 924(c)(1)(A)(ii), does not set forth a sentencing factor, but rather an element of the offense that must be specifically charged in the indictment and proved beyond a reasonable doubt at trial.

"Whether a fact is an offense element or a sentencing consideration is a matter of statutory interpretation." *United States v. Davis*, 184 F.3d 366, 368 (4th Cir. 1999).[1] Thus, we look to the statute's language, structure, context, and history in determining whether "brandished" is a sentencing factor. *See Castillo v. United States*, 120 S. Ct. 2090, 2092 (2000).

---

[1] Of course, after the Supreme Court's decision in *Apprendi v. New Jersey*, 120 S. Ct. 2348, "*any fact* that increases the penalty for a crime beyond the prescribed statutory maximum *must* be submitted to a jury, and proved beyond a reasonable doubt," *id.* at 2362-63 (emphasis added), thus obviating the need for "statutory interpretation" in those instances.



Most significant in determining whether the brandishing clause sets forth a sentencing factor or an element of the crime is the statutory language itself. Section 924(c)(1)(A)(ii) provides for no statutory maximum sentence. Instead the statute "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of [brandishing] a firearm." *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88 (1986). In other words, the sentencing court's finding that Harris "brandished" a firearm under subsection (ii) triggered a mandatory minimum sentence, but did not "increase[ ] the penalty . . . beyond the prescribed statutory maximum." *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2362-63 (2000).

In *McMillan*, the Supreme Court upheld Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982), which provided a mandatory minimum sentence of five years upon a finding that a defendant "visibly possessed a firearm" during the commission of certain felonies. *McMillan*, 477 U.S. at 80-81. The Court rejected the contention that the visible possession provision was an element of the offense because it did not "expose[ ] [the defendants] to greater or additional punishment." *Id.* at 88. The Court explained that the challenged statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty. . . . The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 87-88. Consequently, the

*McMillan* Court held that the mandatory minimum provision was simply a permissible restriction on the sentencing judge's discretion. *Id.* at 88. *See also Williams v. New York*, 337 U.S. 241, 246 (1949) ("[A] sentencing judge [can] exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed *within limits fixed by law.*") (emphasis added).

Because, like the statute at issue in *McMillan*, § 924(c)(1)(A) contains no maximum penalty, the government's failure to charge and prove brandishing beyond a reasonable doubt did not expose Harris to a punishment greater than he could have received had the sentencing judge not found that Harris "brandished" a firearm. Even without the "brandished" finding, Harris could have received a seven-year sentence. In fact, the sentencing judge noted that if we reversed his brandishing ruling, he might nonetheless exercise his discretion and apply a seven-year prison term upon re-sentencing.

Harris recognizes that the instant case involves a mandatory minimum provision, but nonetheless asserts that the Court's decision in *Apprendi* governs. He agrees that although *Apprendi* directly addressed an increase in a statutory maximum, it "also should apply to a statutory fact which increases the mandatory minimum sentence." Reply Brief at 2. But, by its own terms, *Apprendi* forecloses this argument; there, the Supreme Court explained:

> We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict – a limitation identified in the *McMillan* opinion itself.



*Apprendi*, 120 S. Ct. at 2361 n.13. In essence, Harris asks this court to do what the Supreme Court has explicitly refused to do. While the Supreme Court may certainly overrule *McMillan* in the future and apply *Apprendi* to any factor that increases the minimum sentence or "range" of punishment, rather than only the maximum punishment, *see Jones*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring) (opining that *McMillan* should be reconsidered), that is not our role. *See West v. Anne Arundel County*, 137 F.3d 752, 760 (4th Cir. 1998)

("Lower federal courts have repeatedly been warned about the impropriety of preemptively overturning Supreme Court precedent.").[2]

Indeed, this court and others have already held that *Apprendi* "only applies to sentences 'beyond the prescribed statutory maximum.' " *United States v. Pratt*, No. 99-4424, 2001 WL 101457 (4th Cir. Feb. 7, 2001). *See also United States v. Williams*, 238 F.3d 871, 877 (7th Cir. 2001)

---

[2] Harris may be correct that absent the district court's finding that he "brandished" a firearm, it is "unlikely," under the Sentencing Guidelines, that he would have received more than five years. *See* U.S.S.G. § 2K2.4(a)(2). But, that fact does not assist him because "the relevant 'maximum' under *Apprendi* is found on the face of the statute rather than in the Sentencing Guidelines." *United States v. Kinter*, 235 F.3d 192, 201 (4th Cir. 2000). Thus, although the finding may have increased his sentence under the Sentencing Guidelines, it still did not increase it beyond the "prescribed *statutory* maximum." *Apprendi*, 120 S. Ct. at 2363 (emphasis added).

("[I]f a defendant is sentenced under the statutory maximum, his sentence is not violative of *Apprendi*, regardless of a district court's consideration of a mandatory minimum sentence."); *United States v. Carlson*, 217 F.3d 986, 987 (8th Cir. 2000) (holding that § 924(c)(1)(A)(ii) is a mandatory minimum sentencing factor and not affected by *Apprendi*); *United States v. Pounds*, 230 F.3d 1317, 1319 (11th Cir. 2000) (same). *But cf. United States v. Bandy*, 2001 WL 69052, at *4-5 (6th Cir. Jan. 30, 2001) (relying on *Castillo* and finding that the "short-barreled shotgun" provision of 18 U.S.C. § 924(c)(1)(B)(i), which triggers a longer minimum sentence, is an element of the offense).

Moreover, since the application of § 924(c)(1)(A)(ii) did not expose Harris to a penalty greater than that already allowed under the statute, we are not faced with the concerns at issue in *Castillo*, or *Jones*, on which Harris principally relies. Unlike the instant case, both *Jones* and *Castillo* presented situations in which the finding of a certain statutory fact exposed the defendant to a term of imprisonment more severe than would have been permitted without the finding of that fact. *See Castillo*, 120 S. Ct. at 2092 (maximum sentence raised by twenty-five years if the crime was committed with a "machine gun"); *Jones*, 526 U.S. at 230-31 (sentence increased by ten years upon finding that the crime resulted in "serious bodily injury").

Furthermore, other factors also support the conclusion that "brandished" is not an offense element. First, the structure of the statute suggests this. Congress set the first paragraph of § 924(c)(1)(A) apart from the three subsections below, indicating that this first paragraph contains the elements of the crime – using or carrying a



firearm in relation to or possessing a firearm in furtherance of drug trafficking – while the subsections list sentencing factors limiting the judge's discretion when sentencing those convicted of the crime. *See Castillo*, 120 S. Ct. at 2093; *Carlson*, 217 F.3d at 987; *Pounds*, 230 F.3d at 1319. We acknowledge that § 924(c)(1)(A) is similar in structure to the carjacking statute at issue in *Jones*, but even the *Jones* Court recognized that a "principal paragraph" followed by "numbered subsections" has a "look" suggesting that the subsections are sentencing factors. *Jones*, 526 U.S. at 232.

Despite the statute's "look," the Court in *Jones* determined that the subsection at issue there stated a separate offense element; in part because it provided for "steeply higher penalties" and more importantly because Congress had previously treated "serious bodily injury" as a criminal offense element. *Id.* at 233, 235-36. The *Jones* Court cited no less than three federal statutes that "unmistakably identified serious bodily injury as an offense element." *Id.* at 235 (citing 10 U.S.C. § 928(b)(2); 18 U.S.C. § 37(a)(1); and 18 U.S.C. § 1091 (a)(2)). Similarly, the statute at issue in *Castillo* provided steeply higher penalties and involved a factor that Congress had traditionally treated as a separate element of a criminal offense. *Castillo*, 120 S. Ct. at 2094, 2096. And again, the Supreme Court cited statutes in which Congress treated "machinegun" as a substantive element of a criminal offense. *Id.* at 2094.

In contrast, Harris has cited no federal statute in which Congress has treated "brandished" as a separate

offense or element of an offense.[3] Nor have we located any such federal statute. Indeed, "brandish" seldom appears in the United States Code, but instead arises with great frequency in the United States Sentencing Guidelines as the basis for a sentence enhancement. *See, e.g.*, U.S.S.G. § 2A2.2(b)(2)(c), § 2B3.1(b)(2)(C), § 2E2.1 (b)(1)(c), § 2L1.1(b)(4)(c).[4]

Although inconclusive, the legislative history of the 1998 amendment to § 924(c) also hints that Congress has traditionally viewed "brandished" not as an integral element of the offense, but more as a "manner in which a basic crime was carried out," thus having the characteristic of a "[t]raditional sentencing factor[ ]." *Castillo*, 120

---

[3] Harris does cite W. Va. Code § 61-7-11 (West 2000) and VI. Code Ann. Tit. 14 § 621 (1999), in which brandishing a weapon is an element of a crime. Brief of Appellant at 21. Although the Supreme Court in *Jones* acknowledged that "[s]tate practice bolster[ed]" the Court's holding, it also recognized that state practice is not "direct authority for reading the federal carjacking statute." *Jones*, 526 U.S. at 236-37. Without evidence that Congress has treated brandishing as an offense element in other federal statutes, we do not find the fact that a state and a territory have done so to be sufficient evidence from which to glean congressional intent in this case.

[4] That "brandished" appears in the Sentencing Guidelines is not by itself proof that it is a sentencing factor. "Serious bodily injury," which the *Jones* Court found to be an element of the carjacking offense, often appears in the Sentencing Guidelines as the basis for a sentencing enhancement. *See, e.g.*, U.S.S.G. § 2A4.1(b)(2)(B) (increasing kidnaping sentence by two levels if victim sustained "serious bodily injury"). However, the fact that "brandish" is a frequent sentencing enhancement coupled with the fact that we have found no federal statute treating it as an offense element, suggests that Congress has not traditionally treated it as such.



S. Ct. at 2094. The original proposed amendment, as passed by the House, read:

> A person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States –
>
> (A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;
>
> (B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or
>
> (C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years. . . .

H.R. 424, 105th Cong. (2d Sess. 1998); 144 Cong. Rec. H530-31, H535 (daily ed. Feb. 24, 1998) (passing the bill in the House).

In the final bill, however, Congress decided not to include brandishing or discharging as actus reus elements of the offenses proscribed in the initial principal paragraph.[5] While we are careful not to read too much

---

[5] The previous version of § 924(c)(1) applied to only one who "uses" and "carries" a firearm in relation to a drug trafficking or violent crime. There was no provision for possessing. The Supreme Court, in *Bailey v. United States*, 516 U.S. 137 (1995), held that "use" meant active use and mere

into this alteration, the fact that "brandished" and "discharged" remained in subordinate subsections, while "possessed" ascended to accompany the main criminal acts from the previous bill, cannot be completely overlooked. In fact, the Supreme Court in *Castillo* recognized that Congress's 1998 amendment of § 924(c), separating certain statutory factors into numbered subsections, "suggest[ed] a contrary interpretation" from the one it ultimately adopted. *Castillo*, 120 S. Ct. at 2093. However, the Court refused to consider these 1998 changes, because it was addressing the 1993 version of § 924(c). *Id.* We, however, are interpreting § 924(c) as amended in 1998 and so must take into account those changes acknowledged but not considered in *Castillo*.

The *Castillo* decision is also helpful in that the Court specifically suggested that "brandished" is a sentencing factor, stating that "[t]raditional sentencing factors often involve . . . special features of the manner in which a basic crime was carried out (e.g., that the defendant abused a position of trust or *brandished a gun*)." *Castillo*, 120 S. Ct. at 2094 (emphasis added). The fact that the Supreme Court used "brandished a gun" as an example of a sentencing factor gives us an additional measure of confidence that our decision falls within the Supreme Court's recent jurisprudence on the issue.

---

possession was insufficient for conviction. *Id.* at 143-44. In response, Congress sought to amend § 924(c) to criminalize possession in furtherance of a drug trafficking crime. *See* 144 Cong. Rec. S12670-71 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine); 144 Cong. Rec. H531 (daily ed. Feb. 24, 1998) (statement of Rep. McCollum).



Finally, § 924(c)(1)(A) also differs from the statutes at issue in *Jones* and *Castillo* in that the severity of the separate harms in those statutes were punctuated by the "steeply higher penalties" assessed when the elements at issue were found. *Jones*, 526 U.S. at 2333 (noting that the maximum carjacking penalties were increased by ten years for serious bodily harm); *Castillo*, 120 S.Ct. at 2095 (noting that the maximum penalty for carrying a firearm increased from five to thirty years when the firearm was a machinegun). In comparison, the mandatory minimum for brandishing a firearm as opposed to simply carrying a firearm increases by only two years. At oral argument, Harris maintained that the two-year enhancement increased the penalty by forty percent, and is thus a "steeply higher penalty." This argument is misleading because Harris's *available* penalty did not increase at all upon the "brandished" finding – he could have received seven years even without that finding. In addition, the claimed forty percent increase is less than the 500 percent increase in *Castillo* or even the sixty-six percent increase in *Jones*. And regardless of the percentages, a two-year sentence enhancement is not as "steep" as an additional ten or twenty-five years in prison.[6]

For the foregoing reasons, we hold that the "brandished" clause of 18 U.S.C. § 924(c)(1)(A)(ii) sets forth a sentencing factor that need not be charged in the indictment. Harris's evidentiary arguments are totally without

---

[6] Indeed, percentages can be misleading; for instance, a penalty enhancement from one to three days imprisonment would be a 200 percent increase, but we would be hard-pressed to call such an increase "steep."

merit.[7] We, therefore, affirm Harris's conviction and sentence.

*AFFIRMED*

---

[7] Harris asserts that the government offered insufficient evidence to prove that he carried his gun "in relation to" drug trafficking. On the facts here, a reasonable finder of fact could certainly conclude that he carried his gun in relation to his drug sales. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Harris also claims that the evidence was insufficient to support the sentencing court's finding that he "brandished" his gun. Given the evidence that Harris carried and displayed the firearm in the pawn shop, carried it to the drug sales, explained that it had a high-capacity magazine and could pierce an officer's armored jacket, and that it was visible in his holster during the drug sales, we can hardly conclude that the district court clearly erred in finding that he "brandished" it as defined by 18 U.S.C. § 924(c)(4).

---



Office of the Clerk

Supreme Court of the United States
Washington, D.C. 20543-0001

December 10, 2001

William C. Ingram
First Asst. Federal Public Defender
101 South Elm Street, Suite 210
Greensboro, North Carolina 27401

**Re: 00-10666 – Harris, William J. v. United States**

Dear Mr. Ingram:

The Court today entered the following order in the above case:

> "The motion of petition for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the following question: Given that a finding of "brandishing," as used in 18 U.S.C. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?"

* * *

If I may be of any assistance, please contact me.

Sincerely,

WILLIAM K. SUTER, CLERK

/s/ Denise J. McNerney
Denise J. McNerney
Merits Cases Clerk
(202) 479-3032

Enclosures

---